ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 366. MEDICAID ELIGIBILITY FOR WOMEN, CHILDREN, YOUTH, AND NEEDY FAMILIES

SUBCHAPTER B. PRESUMPTIVE MEDICAID PROGRAM

The Texas Health and Human Services Commission (HHSC) adopts amendments to §366.201, concerning General; §§366.211, 366.215, 366.217, 366.219, and 366.221, concerning Eligibility Requirements; and §366.251, concerning Provider Requirements. HHSC adopts the repeal of §§366.223, 366.225, 366.227, 366.229, 366.231, 366.233, 366.235, 366.237, 366.239, 366.241, 366.243, and 366.245, concerning Eligibility Requirements; and §366.253, concerning Provider Requirements. HHSC adopts new §§366.223, 366.225, 366.227, 366.229, 366.231, 366.233, 366.235, and 366.237, concerning Eligibility Requirements; and a new Division 4, comprising of §366.261 and §366.263, concerning Oversight. The amendments, repeals, and new sections are adopted without changes to the text as published in the September 5, 2014, issue of the *Texas Register* (39 TexReg 6956) and will not be republished.

HHSC also adopts amendments to §366.203, concerning Definitions and §366.213, concerning Eligible Groups with small grammatical changes to the text as published in the September 5, 2014, issue of the *Texas Register* and will be republished.

BACKGROUND AND JUSTIFICATION

HHSC adopts the amendments, repeals, and new sections to implement federal requirements for presumptive eligibility for Medicaid. *See* 42 C.F.R. part 435, subpart L. Under amendments to federal rules, hospitals now have the option to make presumptive eligibility determinations for pregnant women, children, parents and caretaker relatives, and former foster care children regardless of whether the state chooses to provide presumptive eligibility for these groups. *See* 42 C.F.R. §435.1110(b); 78 Fed. Reg. 42160, 42304 (July 15, 2013).

HHSC's adopted rules set out the eligibility requirements for individuals to qualify for presumptive eligibility, the requirements for providers making presumptive eligibility determinations, and HHSC responsibilities for oversight of providers making presumptive eligibility determinations. In addition, to align policies and procedures, HHSC adopts amendments to existing rules for qualified entities making presumptive eligibility determinations for pregnant women.

The adopted rules comply with federal regulations in 42 C.F.R. §§435.1102, 435.1103, and 435.1110.

COMMENTS

HHSC received written comments from the Texas Hospital Association. A summary of the comments and the responses follow.

Comment: The commenter suggests that the standards to which §366.261, concerning Oversight of Qualified Hospitals and Qualified Entities, refer, are not statistically significant and, moreover, will be impossible for hospitals to achieve.

Response: HHSC declines to revise the rules in response to the comment. 42 C.F.R. §435.1110(d) allows a state to establish oversight mechanisms to ensure that each qualified hospital is making Presumptive Medicaid determinations consistently with statutes and regulations. CMS has indicated that these oversight mechanisms, such as standards, are "a state responsibility[, and] … appropriate for state flexibility." 78 Fed. Reg. 42160, 42176 (July 2013). Moreover, the rule itself does not set the standards; the standards are set in the corresponding state plan amendment, which CMS has approved.

Comment: The commenter specifically recommends that HHSC adopt a rule to develop a process that allows a disqualified hospital to requalify for the program.

Response: HHSC declines at this time to revise the rules in response to the comment. HHSC will continue to monitor the need for changes.

DIVISION 1. GENERAL

1 TAC §366.201, §366.203

LEGAL AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted amendments affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

§366.203. Definitions.

In this subchapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--An individual seeking assistance under the Presumptive Medicaid Program who:

(A) has never received Medicaid and is not currently receiving Medicaid; or

(B) previously received Medicaid but subsequently was denied and reapplies for Medicaid.

(2) Authorized representative--An individual or organization whom an applicant authorizes to apply for Medicaid benefits on behalf of the applicant.

(3) Caretaker--An individual who supervises and cares for a child, and who meets relationship requirements of §366.519(b) and §366.719(c) of this chapter (relating to Relationship and Domicile).

(4) C.F.R.--Code of Federal Regulations.

(5) Child--An adoptive, step, or natural child who is under 19 years of age.

(6) Dependent child--A child who is--

(A) either:

(i) under the age of 18; or

(ii) 18 and a full-time student in secondary school or equivalent vocational or technical training, if before attaining age 19 the child may reasonably be expected to complete such school or training; and

(B) deprived of parental support by reason of death, absence from the home, physical or mental incapacity, or unemployment of at least one parent.

(7) Eligible group--A category of individuals who are eligible for the Presumptive Medicaid Program.

(8) Federal Poverty Level (FPL)--The household income guidelines issued annually and published in the *Federal Register* by the United States Department of Health and Human Services.

(9) HHSC--The Texas Health and Human Services Commission or its designee.

(10) Household composition--The group of individuals who are considered in determining eligibility for an applicant or recipient for certain medical programs based on tax status, tax relationships, living arrangements, and family relationships referenced in 42 C.F.R. §435.603(f) as "household."

(11) Household income--The sum of individual incomes of every individual within an applicant's or recipient's household composition, from which is subtracted the standard income disregard.

(12) Household size--The number of individuals in an applicant's or recipient's household composition, plus the number of unborn children, if applicable, referenced in 42 C.F.R. §435.603(b) as "family size."

(13) Individual income--The sum of income received by the individuals in a household composition, from which is subtracted expenses, in compliance with 42 C.F.R. §435.603(e), referenced as "MAGI-based income."

(14) MAGI--Modified adjusted gross income.

(15) Medicaid--A state and federal cooperative program, authorized under Title XIX of the Social Security Act (42 U.S.C. Chapter 7, Title XIX) and Texas Human Resources Code Chapter 32, that pays for certain medical and health care costs for individuals who qualify.

(16) Medicaid provider--A health care practitioner, institution, or other entity enrolled in the Medicaid program and authorized to submit claims for payment or reimbursement of Medicaid services.

(17) Newborn--A child from birth through 12 months of age.

(18) Parent--An individual who is the adoptive, step, or natural parent of a child.

(19) Person acting responsibly--An individual, other than a provider, who may apply for Medicaid on behalf of an applicant who is incompetent or incapacitated if HHSC determines the individual is acting responsibly on behalf of the applicant.

(20) Presumptive Medicaid--A period of temporary Medicaid for pregnant women, children under age 19, parents and caretaker relatives, and former foster care children for whom eligibility is determined by a qualified hospital or a qualified entity.

(21) Presumptive eligibility segment--A period of Medicaid coverage that begins with the date a qualified hospital or qualified entity determines an individual eligible for Presumptive Medicaid and ends:

(A) the date that HHSC determines the individual's eligibility for ongoing Medicaid, if the individual submits an application for ongoing Medicaid; or

(B) the last day of the month following the month the Presumptive Medicaid determination is made, if the individual does not submit an application for ongoing Medicaid.

(22) Qualified entity--A Medicaid provider that notifies HHSC of its election to make presumptive eligibility determinations and agrees to make presumptive eligibility determinations for pregnant women only according to HHSC policies and procedures.

(23) Qualified hospital--A hospital that is a Medicaid provider, notifies HHSC of its election to make presumptive eligibility determinations, and agrees to make presumptive eligibility determinations for children under age 19, pregnant women, parents and caretaker relatives, and former foster care children according to HHSC policies and procedures.

(24) Recipient--An individual receiving Presumptive Medicaid Program services.

(25) Sibling--An individual under age 19 who is an adoptive, step, or natural sibling of a child.

(26) Standard income disregard--An income disregard equal to five percentage points of FPL fr the applicable household size.

(27) Texas Health Steps--Federally mandated Medicaid services that provide medical and dental check-ups, diagnosis, and treatment to eligible clients from birth through age 20. Federally, this program is known as the Early Periodic, Screening, Diagnostic and Treatment (EPSDT) Program.

(28) *Texas Works Handbook*--An HHSC manual containing policies and procedures used to determine eligibility for Supplemental Nutrition Assistance Program (SNAP) food benefits, Temporary Assistance for Needy Families (TANF), the Children's Health Insurance Program (CHIP), and Medicaid programs for children and families. The *Texas Works Handbook* is found on the Internet at www.dads.state.tx.us/handbooks/TexasWorks.

(29) Third-party resource--An individual or organization, other than HHSC or an individual living with the applicant, who may be liable as a source of payment of the applicant's medical expenses (for example, a health insurance company).

(30) U.S.C.--United States Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Jack Stick
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DIVISION 2. ELIGIBILITY REQUIREMENTS

1 TAC §§366.211, 366.213, 366.215, 366.217, 366.219, 366.221, 366.223, 366.225, 366.227, 366.229, 366.231, 366.233, 366.235, 366.237

LEGAL AUTHORITY

The amendments and new sections are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted amendments and new sections affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

§366.213. Eligible Groups.

To qualify for the Presumptive Medicaid Program, an applicant must:

(1) be--

(A) a pregnant woman with household income less than or equal to the limit for Pregnant Women's Medicaid as stated in §366.307 of this chapter (relating to Eligible Group);

(B) a newborn with household income less than or equal to the limit stated in §366.507(1) of this chapter (relating to Eligible Groups);

(C) a child age one through 18 years of age with household income less than or equal to the limit stated in §366.507(2) of this chapter;

(D) a parent or caretaker relative of a dependent child who receives Medicaid and meets the income eligibility criteria stated in §366.723 of this chapter (relating to Income Eligibility); or

(E) an individual who was under the conservatorship of this State upon attaining age 18, received Medicaid at the time he or she left foster care, and is 18 through 25 years of age as stated in §366.1011 of this chapter (relating to Eligible Group);

(2) not be currently receiving benefits under Medicaid or the Children's Health Insurance Program; and

(3) not have received a presumptive eligibility segment--

(A) during her current pregnancy; or

(B) within the past two calendar years for children under age 19, parents or caretaker relatives, or former foster care children.

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1 TAC §§366.223, 366.225, 366.227, 366.229, 366.231, 366.233, 366.235, 366.237, 366.239, 366.241, 366.243, 366.245

LEGAL AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted repeals affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

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DIVISION 3. PROVIDER REQUIREMENTS

1 TAC §366.251

LEGAL AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted amendment affects Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

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1 TAC §366.253

LEGAL AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted repeal affects Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

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DIVISION 4. OVERSIGHT

1 TAC §366.261, §366.263

LEGAL AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The adopted new sections affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this adoption.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER F. COMPLIANCE MONITORING

10 TAC §§10.601, 10.607, 10.609, 10.612 - 10.614, 10.618, 10.620, 10.624

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC §§10.601, 10.607, 10.609, 10.612 - 10.614, 10.618, 10.620, and 10.624 with changes to the proposed text as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7458). The amendments affect §10.601(b) concerning Compliance Monitoring Objectives and Applicability; §10.607 concerning Reporting Requirements; §10.609(5) concerning Notices to the Department; §10.612, concerning Tenant File Requirements; §10.613 concerning Lease Requirements; §10.614 concerning Utility Allowances; §10.618 concerning Onsite Monitoring; §10.620(b) concerning Monitoring for Non-Profit Participation or HUB Participation; and §10.624 concerning Events of Noncompliance.

REASONED JUSTIFICATION. The purpose of the amendments is to create clarification and improvement to the rule in an effort to provide better guidance on complying with multifamily Department programs.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Comments were accepted from September 19, 2014, through November 14, 2014, with comments received from (1) Brad Bell, (2) Darlene Sidebottom, (3) David Mintz, (4) Dyan Adair, (5) Jacqueline Kawas, (6) Jen Joyce, (7) Lori Erbst, (8) Patricia Hensley, (9) Patrick Barbolla, (10) Sandy Bolton, (11) Sergio Amaya; and, (12) Trisha Keenan.

Comment was received from Commenter (5) regarding §10.601(a)(4) and §10.602; however, amendments to that paragraph and section were not proposed. Further, staff does not propose amendments based on the comment at this time.

COMMENT SUMMARY: §10.607(d)(4) relating to financial reporting - Commenter (6) requested additional training and resources on proper completions of these reports. Commenter (9) noted that the due date listed in subparagraph (2) for submission of quarterly financial reporting for TCAP and Exchange properties incorrectly states that the report is due the 10th day of the month and should be changed to the 15th as prescribed in the HTC Exchange Subaward Agreements.

STAFF RESPONSE: Staff agrees with commenter (9) and the paragraph will read: "(2) Developments funded with Exchange or TCAP must also submit a "Quarterly Owner's Financial Certification" and these must be submitted in January, April, July, and October on the 15th day of the month." Regarding commenter (6), the Department is evaluating additional training opportunities and resources to assist in completing these reports but no changes are recommended to the rule based on the comment.

COMMENT SUMMARY: §10.612(b)(1) relating to Example 612(1) - Commenters (2), (5), (8), (10) and (12) commented on the use and placement of the word "within" in the example. The concern was that, in its current form, the rule intimates that the action could be taken before or after the due date.

STAFF RESPONSE: Staff agrees, and the example will read: "Example 612(1): The household moved into the Project on May 15, 2013. The information must be collected within the 120 days proceeding May 15th every year thereafter."

COMMENT SUMMARY: §10.612(c)(3) relating to Ongoing tenant file requirements for HOME Developments - Commenter (6) requested that, if a separate HOME Program Recertification form is required, that they be given an opportunity to review.

STAFF RESPONSE: Upon review of the amendment, staff has removed the proposed provision for a separate HOME Program Recertification form because it is unnecessary to promote compliance. The reference to a specific HOME Program Recertification form has been eliminated. The rule will continue to require the Department's Income Certification form unless the property also participates in the Rural Development or a project Based HUD program, in which case, the other program's Income Certification form will be accepted.

COMMENT SUMMARY: §10.614(f)(1)(D) relating to how to calculate the Public Housing Authority utility allowance total - Commenter's (2) and (12) suggest adding the word "up" in regards to how to round to the next whole number.

STAFF RESPONSE: Staff agrees and the subparagraph will read: "(D) If the individual components of a utility allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar."

COMMENT SUMMARY: §10.613(c) relating to Evictions and terminations of tenancy for other than good causes are prohibited - Commenter (11) stated that the changes appear to be unnecessary since the Department is unable to overturn a judicial ruling. Commenter (3) opposes the proposed change and requested that it be deleted. The commenter states that whether an eviction meets the test of good cause should solely be within the purview of a court of competent jurisdiction and does not feel that the Department is qualified to make such an evaluation.

STAFF RESPONSE: The Department is required by federal and state regulations to monitor requirements that are incorporated into a Development's LURA. Violation of these provisions would generally cause an Owner to be out of compliance with a LURA and would not be considered good cause for eviction. Accordingly, the Department has clarified the process it uses to make such determinations and the subsection will read: "(c) Evictions and terminations of tenancy for other than good cause are prohibited. If a challenge to an eviction or termination of tenancy is related to a reasonable accommodation as defined by §1.204 of this title (relating to Reasonable Accommodations), a violation of the provision found in subsection (g) of this section, or for Developments financed by Direct Loans where actions trigger Title 104(d) of the Housing and Community Development Act of 1974 or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the Department upon the request of either party will determine if an Owner is in compliance with the referenced requirements using the methods outlined in 1.2 of this Title (regarding Department Compliant System) or as required by federal law. Otherwise, the Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy for other reasons must be made by a court of competent jurisdiction or an agreement of the parties in arbitration, and the Department will rely on that determination."

Significant comment was received regarding the proposed change to §10.613(k) relating to the requirement for *A Tenant Rights and Recourses Guide.* The comment and response are presented by subject:

COMMENT SUMMARY: All commenter's expressed concern about the length of the document and the potential related cost of reproduction.

STAFF RESPONSE: Staff disagrees that there is any additional cost and no change is recommended. The Department will create an electronic version of the *A Tenant Rights and Recourses Guide* that the owner will be able to download and customize with the property specific unit/common amenities and service(s). This brochure replaces two (2) current forms required to be printed and/or reproduced; the Fair Housing Disclosure Notice and the Amenity/Service(s) notice. The Fair Housing Disclosure Notice is one (1) page and the Amenity/Service(s) notice is, at least, one page and could be more because of the number of services and amenities available at the property. The proposed Tenant Rights and Resources Guide is six (6) pages with a seventh "certification of receipt" page for the household to sign. If printed two-sided, it will be four (4) pages (three (3) pages of content and one (1) signatory page). Therefore, as most, properties will be printing or reproducing two additional pieces of paper. Such cost, if any, would likely be considered de minims.

COMMENT SUMMARY: Commenter (2) indicates that amenities and services do not belong in the *A Tenant Rights and Recourses Guide* (concurred with by Commenter (12)). Instead the commenter proposes that the Fair Housing Disclosure Notice be updated with "the basics" that properties be required to have a "How to File a Fair Housing Complaint" poster. The commenter noted that the remaining language found in the document is already contained in the Texas Apartment Association (TAA) lease and lease addendums. Commenter (3) requests that the Department allow for a "substantially equivalent" brochure because it may be beneficial to the owner to reproduce the information in a different format. Commenter (7) stated that the language "common amenities, unit amenities, and services" is redundant and not productive because amenities and services are listed on all marketing materials and that they do not hide what is offered. In light of their practice, the commenter wonders why they need to list common amenities, unit amenities, and services. Com-

menter (10) does not understand combining the Fair Housing Disclosure Notice and Amenity notice; and, that Tenant rights are already covered in the TAA lease and lease addendums. The commenter further questions why the Amenity notice needs to be signed on the day the lease is executed.

STAFF RESPONSE: Staff commends Commenter (7) internal practice of transparency regarding common/unit amenities and service(s) and believes that this rule will promote similar and consistent practices with all multifamily properties in the Department's portfolio. Staff disagrees with Commenter (2) and (12) that amenities and services do not belong in the *A Tenant Rights and Recourses Guide* because the tenants do have a right to these items and this communication is the only avenue through which tenants are notified of these rights. Staff also disagrees with Commenters (2) and (10) that Tenant rights are already addressed in the TAA lease and lease addendums. While general tenant rights may be included, there are additional rights that a tenant becomes entitled to by living and a TDHCA monitored property that are program driven and would not be included in the TAA lease and lease addendums. For example, a tenant's right to a reasonable accommodation in some cases or their rights under a TDHCA program's Extended Use Agreement are not addressed in the TAA lease and/or lease addendums. Furthermore, there is no required format for leases (and/or lease addendum), so even if these did contain such language, since the TAA lease is not required, this recommendation would not meet the Department's mission. In response to the request to allow for "substantially equivalent" brochure (Commenter 3) Staff believes that, to ensure accuracy and consistency in both implementation and monitoring, a single format is the most productive avenue. Commenter (10) is incorrect in the interpretation when the document needs to be signed. It is not required to be signed on the day the lease is actually executed; rather, the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

COMMENT SUMMARY: Commenter (1) suggests that the *A Tenant Rights and Recourses Guide* be available to anyone upon demand. The rule specifies that the document must be provided "during the application process and upon a subsequent change to [common amenities, unit amenities, or required services]." If there is no change to amenities and services (the case for most properties), then 1) Tenants who signed an initial lease prior to the rule's effective date may never see the document, and 2) Those who sign an initial lease after and stay at the property for a few years will see the Guide once, and could easily lose it over time. The Commenter also requested that the Department require owners to list property specific amenities and services in the same manner they are listed in the Land Use Restriction Agreement (LURA). For example, the commenter wants the Department to require properties to list "14 SEER HVAC" instead of "Energy efficient HVAC". The commenter also requested specificity when describing required supportive services because in recent years properties were allowed to commit to providing a certain number of services, within a defined basket, without actually specifying which of these services would be provided. The commenter stated that for the Guide to be useful to current and prospective tenants, the actual services being provided at the property should be listed, rather than a laundry list of potentially provided services. The commenter also requested that the Department develop and publish minimum acceptable standards for hours/dates of availability of services and amenities, and, where applicable, incorporate them into the *A Tenant Rights and Recourses Guide.* Whereas, Commenters (7), (8) and (11) state that, in its current form, the *A Tenant Rights and Recourses Guide* will be discarded and not read by most applicants and Commenter (7) proposes, instead, to laminate the pages and present to the resident at application and have them sign an acknowledgement that they have read the document and understand their rights and that copies would be provided upon request. Furthermore, Commenter (11) comments "These are grown adults that are applying for apartments at our communities. It seems to be conflict for a resident to be assisted and essentially "handheld" through the process of filing a complaint against the same organization that is assisting them in filing the complaint."

STAFF RESPONSE: In response to the widely varying comment staff recommends that the following change: "(k) A Development Owner shall post in a common area of the leasing office a laminated copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department A Tenant Rights and Resources Guide, which includes:"

This change addresses Commenter (1)'s concern about how existing household and prospective applicants may be made aware of these provisions by adopting a modified version of the suggestion made by Commenter (7).

Regarding the specificity of the language required in describing the amenities and services, the Department disagrees with the Commenter and no change is suggested. The Department does not agree that the suggested level of description would give a more substantive meaning to the amenity and/or service and that, in some cases, a more plain language description may be a more effective way to communicate. Although staff does not agree that the brochure should mirror the language in the LURA, staff will monitor compliance amenities and services such as "14 SEER HVAC" vs. "energy efficient HVAC" during Final Construction Inspections and subsequent monitoring reviews. Lastly, the Department lacks authority to develop and publish minimum acceptable standards for hours/dates of operation for existing properties. Staff may consider imposing some kind of a requirement in the development of the future a Qualified Allocation Plan (QAP) but recommends no change to the Compliance Rule at this time.

STATUTORY AUTHORITY. The amendments are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The amendments affect no other code, article, or statute.

§10.601. Compliance Monitoring Objectives and Applicability.

(a) The objectives of the Department in performing regular monitoring of affordable rental housing are:

(1) To provide for monitoring that meets applicable requirements of:

(A) The U. S. Department of Housing and Urban Development (HUD);

(B) The U. S. Department of the Treasury (Treasury);

(C) The Internal Revenue Service (the "IRS"); and

(D) Applicable state laws and rules;

(2) To enable the Department to report information to HUD, Treasury, the IRS, and the Governing Board, as required, regarding the condition and operations of such developments;

(3) To enable the Department to communicate with responsible persons regarding the condition and operation of their developments and understand clearly, with a documented record, how they are performing in meeting their obligations;

(4) To identify matters of noncompliance so that they can be appropriately addressed and to assist in targeting issues that may require compliance assistance education;

(5) To ensure that responsible persons understand the compliance status of their developments and the implications of such status;

(6) To articulate and communicate clear standards to promote the maintenance and operation of such developments in a manner that meets the high standards of the Department's affordable rental programs; and

(7) To provide a transparent system whereby all interested parties, including tenants, community organizations, local governmental entities, and the affordable housing industry, may find accountability, consistency, and an awareness of the high quality standards of affordable housing in the State of Texas.

(b) This subchapter applies to the monitoring of affordable rental housing under the programs described in paragraphs (1) - (8) of this subsection:

(1) The Housing Tax Credit Program (HTC);

(2) The HOME Investment Partnerships Program (HOME);

(3) The Tax Exempt Bond Program (Bond);

(4) The Housing Trust Fund Program (HTF);

(5) The Tax Credit Assistance Program (TCAP);

(6) The Tax Credit Exchange Program (Exchange);

(7) The Neighborhood Stabilization Program (NSP); and

(8) Section 811 Project Rental Assistance (PRA) Program.

(c) There are two key aspects of ongoing monitoring activity, the physical condition of the developments and whether they are being operated in documented compliance with program requirements.

(d) The results of the Department's monitoring activities will be timely and properly documented.

(e) The Department may contract with an independent third party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with the award of any Department funds, including allocations of housing tax credits, and appropriate state and federal laws.

§10.607. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through the Department's web-based Compliance Monitoring and Tracking System (CMTS) and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed for:

(1) 9% Housing Tax Credit Developments - no later than the date prescribed in §10.402(g) of this chapter relating to the 10 Percent Test;

(2) 4% Housing Tax Credit Developments - no later than the date prescribed in §10.402(e) of this chapter (relating to Post Bond Closing Documentation Requirements); or

(3) For all other multifamily developments, no later than September 1st of the year following the award.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the Development, some or all of the Report must be submitted. The first AOCR is due the second year following the award in accordance with the deadlines set out in subsection (e) of this section. Example 607(1): A Development was allocated Housing Tax Credits in July 2011. The first report is due April 30, 2013, even if the Development has not yet commenced leasing activities.

(c) The AOCR is comprised of four parts:

(1) Part A "Owner's Certification of Program Compliance." All Owners must annually certify compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by the U. S. Department of the Treasury to be addressed, including those required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules. HTC Developments during their Compliance Period will also be required to provide the contact information of the syndicator in the Annual Owner's Compliance Report;

(2) Part B "Unit Status Report." All Developments must annually report and certify the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations. In addition, Owners are required to report on the race and ethnicity, family composition, age, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance or if the household elects not to disclose the information, such election;

(3) Part C "Housing for Persons with Disabilities." The Department is required to establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The certified answers to the questions on Part C satisfy this requirement; and,

(4) Part D "Form 8703." Tax exempt bond properties must file Form 8703 each calendar year of the qualified project period. The form is due to the IRS by March 31 after the close of the calendar year for which the certification is made. The Department requires Tax Exempt Bond Development Owners to submit a copy of the filed Form 8703 for the preceding calendar year.

(d) The owner is required to report certain financial information to the Department electronically through CMTS. If supplemental information is required it must be uploaded to the Development's CMTS account.

(1) Developments funded with Exchange or TCAP must also submit a "Quarterly Owner's Financial Certification" and these must be submitted in January, April, July, and October on the 10th day of the month.

(2) Developments funded with Exchange or TCAP must also submit a "Quarterly Owner's Financial Certification" and these must be submitted in January, April, July, and October on the 15th day of the month.

(e) Parts A, B, C, and D of the Annual Owner's Compliance Report and the Annual Owner's Financial Certification must be provided to the Department no later than April 30th of each year, reporting data current as of December 31st of the previous year (the reporting year).

(f) Periodic Unit Status Reports. All Developments must submit a Quarterly Unit Status report to the Department through the Compliance Monitoring and Tracking System. Quarterly reports are due in

January, April, July, and October on the 10th day of the month. The report must report occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th of the preceding month. The first quarterly report is due on the first quarterly reporting date after leasing activity commences.

(g) Owners are encouraged to continuously maintain current resident data in the Department's CMTS. Under certain circumstances, such as in the event of a natural disaster, the Department may alter the reporting schedule and require all Developments to provide current occupancy data through CMTS.

(h) All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.

(i) Exchange developments must submit IRS Form(s) 8609 with lines 7, 8(b), 9(b), 10(a), 10(c), and 10(d) completed thirty (30) days after the Department issues the executed form(s). If an Owner elects to group buildings together into one or more multiple building projects, the owner must attach a statement identifying the buildings in the project. An owner may request to change the election made on line 8(b) only once during the Compliance Period. The request will be treated as non-material amendment, subject to the fee described in §10.901 of this chapter (relating to Fee Schedule) and the process described in §10.405 of this chapter (relating to Amendments and Extensions).

§10.609. Notices to the Department.

If any of the events described in paragraphs (1) - (5) of this section occur, written notice must be provided to the Department within the respective timeframes:

(1) Written notice must be provided at least thirty (30) days prior to any proposed sale, transfer, or exchange of the Development or any portion of the Development, and the Department must give its prior written approval to any such sale, transfer, or exchange, which will include a previous participation review on the proposed new ownership;

(2) Notification must be provided within thirty (30) days following the event of any casualty loss, in whole or in part, to the Development, using the Department's Notice of Casualty Loss (for general casualty losses) or Notice of Disaster Casualty Loss (specific to loss as a result of a Presidentially Declared Disaster);

(3) Owners of Bond Developments shall notify the Department of the date on which 10 percent of the Units are occupied and the date on which 50 percent of the Units are occupied, and notice must occur within ninety (90) days of such dates;

(4) Within thirty (30) days after a foreclosure, the Department must be provided with documentation evidencing the foreclosure and a rent roll establishing occupancy on the day of the foreclosure; and

(5) Within ten (10) days of a change in the contact information (including contact persons, physical addresses, mailing addresses, email addresses, phone numbers, and/or the name of the property as know by the public) for the Ownership entity, management company, and/or Development the Department's Compliance Monitoring and Tracking System must be updated.

§10.612. Tenant File Requirements.

(a) At the time of program designation as a low-income household, typically at initial occupancy, Owners must create and maintain a file that at a minimum contains:

(1) A Department approved Income Certification form signed by all adults. At the time of program designation as a low-income household, Owners must certify and document household income. In general, all low-income households must be certified prior to move in. The Department requires the use of the TDHCA Income Certification form, unless the property also participates in the Rural Development or a Project Based HUD Program, in which case, the other program's Income Certification form will be accepted;

(2) Documentation to support the Income Certification form including, but not limited to, applications, first hand or third party verification of income and assets, and documentation of student status (if applicable). The Department permits Owners to use check stubs or other firsthand documentation of income and assets provided by the applicant or household in lieu of third party verification forms. It is not necessary to first attempt to obtain a third party verification form. Owners should scrutinize these documents to identify and address any obvious attempts at forgery, alteration, or generation of falsified documents;

(3) A lease with all necessary addendums to ensure that compliance with applicable federal regulations and §10.613 of this chapter (relating to Lease Requirements).

(b) Annually thereafter on the anniversary date of the household's move in or initial designation:

(1) Throughout the Affordability Period, all Owners of Housing Tax Credit, TCAP and Exchange Developments must collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, rental amounts and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form. Example 612(1): The household moved into the Project on May 15, 2013. The information must be collected within the 120 days proceeding May 15th every year thereafter.

(2) During the Compliance Period for all Housing Tax Credit, TCAP, and Exchange Developments and throughout the affordability period for all Bond developments and HOME Developments committed funds after August 23, 2013, Owners must collect and maintain current student status data for each low-income household. This information must be collected within 120 days before the anniversary of the effective date of the original student verification and can be collected on the Department's Annual Eligibility Certification or the Department's Certification of Student Eligibility form or the Department's Income Certification form. Throughout the Compliance Period for HTC, TCAP, and Exchange developments, low-income households comprised entirely of full-time students must qualify for a HTC program exception, and supporting documentation must be maintained in the household's file. For Bond developments, if the household is not an eligible student household, it may be possible to re-designate the full-time student household to an Eligible Tenant (ET). For HOME Developments committed funds after August 23, 2013, an individual does not qualify as a low-income or very low-income family if the individual is a student who is not eligible to receive Section 8 assistance under 24 CFR §5.612.

(3) The types of properties described in subparagraphs (A) - (D) of this paragraph are required to recertify annually the income of each low-income household using a Department approved Income Certification form and documentation to support the Income Certification (see subsection (a)(1) - (2) of this section):

(A) Mixed income Housing Tax Credit, TCAP and Exchange projects (as defined by line 8(b) of IRS Form(s) 8609 and ac-

companying statements, if any) that have not completed the fifteen (15) year Compliance Period;

(B) All Bond developments with less than 100 percent of the units set aside for households with an income less than 50 percent or 60 percent of area median income.

(C) HTF Developments with Market Rate units. However, HTF Developments with other Department administered programs will comply with the requirements of the other program. Example 612(2): If a Development is mixed income HTF and 100 percent low-income HTC, all households must be certified at move in. Then, once a calendar year, the Owner must collect the data required by and in accordance with the paragraphs (1) and (2) of this subsection.

(D) HOME Developments. Refer to subsection (c) of this section.

(c) Ongoing tenant file requirements for HOME Developments:

(1) HOME Developments must complete a recertification with verifications of each HOME assisted Unit every sixth year of the Development's affordability period. The recertification is due on the anniversary of the household's move-in date. For purposes of this section the beginning of a HOME Development affordability period is the effective date on the first page of the HOME LURA. For example, a HOME Development with a LURA effective date of May 2001 will have the years of the affordability determined in Example 612(3):

(A) Year 1: May 15, 2001 - May 14, 2002;

(B) Year 2: May 15, 2002 - May 14, 2003;

(C) Year 3: May 15, 2003 - May 14, 2004;

(D) Year 4: May 15, 2004 - May 14, 2005;

(E) Year 5: May 15, 2005 - May 14, 2006;

(F) Year 6: May 15, 2006 - May 14, 2007;

(G) Year 7: May 15, 2007 - May 14, 2008;

(H) Year 8: May 15, 2008 - May 14, 2009;

(I) Year 9: May 15, 2009 - May 14, 2010;

(J) Year 10: May 15, 2010 - May 14, 2011;

(K) Year 11: May 15, 2011 - May 14, 2012; and

(L) Year 12: May 15, 2012 - May 14, 2013.

(2) In the scenario described in paragraph (1) of this subsection, all households in HOME Units must be recertified with source documentation during the sixth and twelfth years or between May 15, 2006, to May 14, 2007, and between May 15, 2012, and May 14, 2013.

(3) In the intervening years the Development must collect a self certification by the effective date of the original Income Certification from each household that is assisted with HOME funds, Example 612(4): a household moved into a HOME unit on June 10, 2010, the household's self certification must be completed by June 10, 2011, and the household must be recertified with source documentation effective June 10, 2012. The Development must use the Department's Income Certification form, unless the property also participates in the Rural Development or a project Based HUD program, in which case, the other program's Income Certification form will be accepted. If the household reports on their self certification that their annual income exceeds the current 80 percent applicable income limit or there is evidence that the household's written statement failed to completely and accurately provide information about the household's characteristics and/or income, then an annual income recertification with verifications is required.

§10.613. Lease Requirements.

(a) Eviction and/or termination of a lease. For HTC Developments, IRS Revenue Ruling 2004-82 prohibits the eviction or termination of tenancy of low-income households for other than good cause throughout the entire Affordability Period, and for three (3) years after termination of an extended low-income housing commitment. Owners executing or renewing leases after November 1, 2007, shall specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited.

(b) For HOME and NSP Developments, the HOME Final Rule (and as adopted by Texas NSP) prohibits Owners from evicting low-income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal, state or local law, for completion of the tenancy period for transitional housing, or for other good cause. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action at least thirty (30) days before the termination of tenancy. Owners executing or renewing leases after November 1, 2007, shall specifically state in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253). Owners must also comply with all other lease requirements and prohibitions stated in 24 CFR §92.253.

(c) Evictions and terminations of tenancy for other than good cause are prohibited. If a challenge to an eviction or termination of tenancy is related to a reasonable accommodation as defined by §1.204 of this title (relating to Reasonable Accommodations), a violation of the provision found in subsection (g) of this section, or for Developments financed by Direct Loans where actions trigger Title 104(d) of the Housing and Community Development Act of 1974 or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the Department upon the request of either party will determine if an Owner is in compliance with the referenced requirements using the methods outlined in 1.2 of this Title (regarding Department Compliant System) or as required by federal law. Otherwise, the Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy for other reasons must be made by a court of competent jurisdiction or an agreement of the parties in arbitration, and the Department will rely on that determination.

(d) HTC and Bond Developments must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME and NSP Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that, all households at HOME and NSP Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355 and §570.487(c))

(g) All Owners shall comply with the lease requirements found in Section 601 of the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"). In general, owners may not construe an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking as a serious or repeated violation of a lease term

by the victim or threatened victim or as good cause for terminating tenancy. However, in accordance with VAWA 2013, owners may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the unit or other affiliated individual as defined in the VAWA 2013.

(h) Leasing of HOME units by organizations that, in turn, rent those units to individuals is not permissible for HOME developments committed funding after August 23, 2013.

(i) Housing Tax Credit units leased to an organization through a supportive housing program where the owner receives a rental payment for the unit regardless of physical occupancy will be found out of compliance if the unit remains vacant for over 60 days. The unit will be found out of compliance under the finding "Violation of the Unit Vacancy Rule."

(j) It is a Development Owner's responsibility at all times to know what it has agreed to provide by way of common amenities, unit amenities, and services.

(k) A Development Owner shall post in a common area of the leasing office a laminated copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, unit amenities, and services; and,

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received.

§10.614. Utility Allowances.

(a) The Department will monitor to determine if Developments comply with published rent limits which include an allowance for tenant paid utilities. For HTC, TCAP, and Exchange buildings, if the residents pay utilities directly to the Owner of the building or to a third party billing company and the amount of the bill is based on an allocation method or "Ratio Utility Billing System" (RUBS), this monthly amount will be considered a mandatory fee. For HTC, TCAP, and Exchange buildings, if the residents pay utilities directly to the Owner of the building or to a third party billing company, and the amount of the bill is based on the tenant's actual consumption, Owners may account for the utility in an allowance. The rent, plus all mandatory fees, plus an allowance for those utilities paid by the resident directly to a utility provider, must be less than or equal to the allowable limit. For HOME, Bond, HTF, and NSP buildings, Owners may account for utilities paid directly to the Owner or to a third party billing company in their utility allowance. Where residents are responsible for some or all of the utilities--other than telephone, cable, and internet--Development Owners must use a utility allowance that complies with both this section and the applicable program regulations.

(b) An Owner may not change utility allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(1): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year 8, the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation. The Department will respond by approving or denying within ninety (90) days of the date on which the party making the request has completed the questionnaire and provided all required supporting documentation and responded to any Department requests for clarification or additional information.

(c) Rural Housing Services (RHS) buildings or buildings with RHS assisted tenants. The applicable utility allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted tenants.

(d) HUD-Regulated buildings layered with any Department program. If neither the building nor any tenant in the building receives RHS rental assistance payments, and the rents and the utility allowances of the building are reviewed by HUD (HUD-regulated building), the applicable utility allowance for all rent restricted Units in the building is the applicable HUD utility allowance. No other utility method described in this section can be used by HUD-regulated buildings.

(e) HOME units at HOME developments committed funds after August 23, 2013 must use the HUD Utility Schedule Model. The utility allowance will be calculated by the Department on an annual basis and provided to the Owner with a deadline for implementation.

(f) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in paragraphs (1) - (5) of this subsection:

(1) The utility allowance established by the applicable Public Housing Authority (PHA) for the Section 8 Existing Housing Program. The Department will utilize Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

(A) If the PHA publishes different schedules based on building type, the Owner is responsible for implementing the correct schedule based on the Development's building type(s). Example 614(2): The applicable PHA publishes a separate utility allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consist of twenty buildings, ten of which are Apartments (5+ units) and the other ten buildings are Duplexes. The Owner must use the correct schedule for each building type.

(B) In the event the PHA publishes a utility allowance schedule specifically for energy efficient units, and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five (5) years.

(C) If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility.

(D) If the individual components of a utility allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(3): Electric cooking is $8.63, Electric Heating is $5.27, Other Electric is $24.39, Water and Sewer is $15. The utility allowance in this example is $54.00.

(E) If an Owner chooses to implement a methodology as described in paragraph (2), (3), (4), or (5) of this subsection, for

Units occupied by Section 8 voucher holders, the utility allowance remains the applicable PHA utility allowance established by the PHA from which the household's voucher is received.

(F) In general, if the property is located in an area that does not have a municipal, county, or regional housing authority that publishes a utility allowance schedule for the Section 8 Existing Housing Program, Owners must select an alternative methodology. In the event the property is located in an area without a clear municipal or county housing authority the Department may permit the use of another housing authority's utility allowance schedule on a case by case basis, unless other conflicting guidance is received from the IRS or HUD. It is the sole responsibility of the Owner to provide the Department with specific rationale to support the request. Prior approval from the Department is required and the owner must obtain approval on an annual basis.

(2) A written estimate from a local utility provider. If there are multiple utility companies that service the Development, the local provider must be a residential utility company that offers service to the residents of the Development requesting the methodology. The Department will use the Texas Electric Choice website: http://www.powertochoose.org/ to verify the availability of service. If the utility company is not listed as a provider in the Development's ZIP code, the request will be denied. Additionally, the estimate must be signed by the utility provider representative and specifically include all "component charges" for providing the utility service. Receipt of the information from the utility provider begins the ninety (90) day period after which the new utility allowance must be used to compute gross rent;

(3) The HUD Utility Schedule Model. A utility estimate can be calculated by using the "HUD Utility Schedule Model" that can be found at http://www.huduser.org/portal/resources/utilmodel.html (or successor Uniform Resource Locator). Each item on the schedule must be displayed out to two decimal places. The total allowance must be rounded up to the next whole dollar amount. The rates used must be no older than the rates in effect sixty (60) days prior to the beginning of the ninety (90) day period in which the Owner intends to implement the allowance. For Owners calculating a utility allowance under this methodology, the model, along with all back-up documentation used in the model, must be submitted to the Department within the timeline described in subsection (h) of this section. The date entered as the "Form Date" on the "Location" tab of the spreadsheet will be the date used to begin the ninety (90) day period after which the new utility allowance must be used to compute gross rent;

(4) An Energy Consumption Model. The utility consumption estimate must be calculated by a properly licensed mechanical engineer or an individual holding a valid Residential Energy Service Network (RESNET) or Certified Energy Manager (CEM) certification. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of building location. Use of the Energy Consumption Model is limited to the building's consumption data for the twelve (12) month period ending no earlier than sixty (60) days prior to the beginning of the ninety (90) day period and utility rates used must be no older than the rates in place sixty (60) days prior to the beginning of the ninety (90) day period. In the case of a newly constructed or renovated building with less than twelve (12) months of consumption data, the qualified professional may use consumption data for the twelve (12) month period from units of similar size and construction in the geographic area in which the building containing the units is located. The ninety (90) day period after which the new utility allowance must be used to compute gross rent will begin sixty (60) days after the end on the last month of the twelve (12) month period for which data was used to compute the estimate; and

(5) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and rates, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method."

(g) For a Development Owner to use the Actual Use Method they must:

(1) Provide a minimum sample size of usage data for at least 5 Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type whichever is greater. Example 614(4): A Development has 20 three bedroom/one bath Units, and 80 three bedroom/two bath Units. Each bedroom/bathroom equivalent Unit is within 120 square feet of the same floor area. Data must be supplied for at least five of the three bedroom/one bath Units, and sixteen of the three bedroom/two bath Units. If there are less than five Units of any Unit Type, data for 100 percent of the Unit Type must be provided;

(2) Scan the information in subparagraphs (A) - (E) of this paragraph and submit it to the Department no later than the beginning of the ninety (90) day period after which the Owner intends to implement the allowance, reflecting data no older than sixty (60) days prior to the ninety (90) day implementation period. Example 614(5): The utility provider releases the information regarding electric usage at Westover Townhomes on February 5, 2010. The data provided is from February 1, 2009, through January 31, 2010. The Owner must submit the information to the Department no later than March 31, 2010, for the information to be valid;

(A) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the actual kilowatt usage for each month of the twelve (12) month period for each Unit for which data was obtained, and the rates in place at the time of the submission;

(B) A copy of the request to the utility provider (or billing entity for the utility provider) to provide usage data;

(C) All documentation obtained from the utility provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(D) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

(E) Documentation of the current utility allowance used by the Development.

(3) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the utility allowance for each bedroom size using the guidelines described in subparagraphs (A) - (E) of this paragraph;

(A) If data is obtained for more than 20 percent of all units or there are more than 5 of a Unit Type, all data will be used to calculate the allowance;

(B) If more than twelve (12) months of data is provided for any Unit, only the data for the most current twelve (12) months will be averaged;

(C) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last twelve (12) months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(D) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

(E) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

(4) The Department will complete its evaluation and calculation within forty-five (45) days of receipt of all the information requested in paragraph (2) of this subsection;

(5) Receipt of approval from the Department will begin the ninety (90) day period after which the new utility allowance must be used to compute gross rent; and

(6) For newly constructed Developments or Developments that have Units which have not been continuously occupied, the Department, on a case by case basis, may use consumption data for Units of similar size and construction in the geographic area to calculate the utility allowance.

(h) Effective dates. If the Owner uses the methodologies as described in subsection (c), (d), or (f)(1) of this section, any changes to the allowance can be implemented immediately, but must be implemented for rent due at least ninety (90) days after the change. For methodologies as described in subsection (f)(2) - (5) of this section, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the ninety (90) day period in which the Owner intends to implement the utility allowance. If the Owner fails to post the notice to the residents and submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the utility allowance using the written local estimate. The annual letter is dated July 5, 2014, and the notice to the residents was posted in the leasing office on July 5, 2014. However, the Owner failed to submit the request to the Department for review until September 15, 2014. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the owner until approved by the Department.

(i) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due ninety (90) days after the change.

(3) HOME Developments committed funds after August 23, 2013. On an annual basis, the Department will calculate the utility allowance using the HUD Utility Schedule Model or other methods allowed in accordance with HUD guidance.

(4) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the update is submitted to the Department, the Owner must post the utility allowance estimate in a common area of the leasing office at the Development. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved utility allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request. If approved, changes to the allowance can be implemented ninety (90) days after the request was submitted to the Department and provided to the residents.

(5) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review.

(j) Combining Methodologies. With the exception of HUD regulated buildings, HOME units at HOME Developments committed funds after August 23, 2013 and RHS buildings, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (electric, gas, etc.). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance.

(k) Increases in Utility Allowances for Developments with HOME or NSP funds. Unless otherwise instructed by HUD, the Department will permit owners to implement changes in utility allowance in the same manner as Housing Tax Credit (HTC) Developments.

(l) The Owner shall maintain and make available for inspection by the tenant, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the tenant at the convenience of both the Owner and tenant.

(m) If Owners want to utilize the HUD Utility Schedule Model, the Written Local Estimate or the Energy Consumption Model to establish the initial utility allowance for the Development, no more than one hundred eighty (180) days and no less than ninety (90) days prior to the commencement of leasing activities, the Owner must submit utility allowance documentation for Department approval. This subsection does not preclude an Owner from changing to one of these methods after commencement of leasing in accordance with subsection (b) of this section.

(n) The Department reserves the right to outsource to a third party the review and approval of all or any utility allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(o) All requests described in this subsection must be uploaded directly to the Development's CMTS account using the "Utility Allowance Documents" in the type field.

§10.618. Onsite Monitoring.

(a) The Department may perform an onsite monitoring review of any low-income Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by the LURA, whichever is later. The Development Owner shall permit the Department access to the Development premises and records.

(b) The Department will perform onsite monitoring reviews of each low-income Development. The Department will conduct:

(1) The first review of HTC, Exchange, and TCAP Developments by the end of the second calendar year following the year the last building in the Development is placed in service;

(2) The first review of all Developments, other than those described in subsection (b)(1) of this section, as leasing commences;

(3) During the Federal Compliance Period subsequent reviews will be conducted at least once every three (3) years;

(4) After the Federal Compliance Period, developments will be monitored in accordance with §10.623 of this chapter (relating to Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period);

(5) A physical inspection of the Development including the exterior of the Development, Development amenities, and an interior inspection of a sample of Units;

(6) Limited reviews of physical conditions, including follow-up inspections to verify completion of reported corrective action, may be conducted without prior notice (unless access to tenant units is required, in which case at least forty-eight (48) hours notice will be provided); and

(7) Reviews, meetings, and other appropriate activity in response to complaints or investigations.

(c) The Department will perform onsite file reviews and monitor:

(1) Low-income resident files in each Development, and review the Income Certifications;

(2) The documentation the Development Owner has received to support the certifications;

(3) The rent records; and

(4) Any additional aspects of the Development or its operation that the Department deems necessary or appropriate.

(d) At times other than onsite reviews, the Department may request for review, in a format designated by the Department, information on tenant income and rent for each Low-Income Unit and may require a Development Owner to submit copies of the tenant files, including copies of the Income Certification, the documentation the Development Owner has received to support that certification, and the rent record for any low-income tenant.

(e) The Department will select the Low-Income Units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular Unit, tenant record, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an onsite inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review. If a credible complaint of fraud or other egregious alleged or suspected noncompliance is received, the Department reserves the right to conduct unannounced onsite monitoring visits.

§10.620. Monitoring for Non-Profit Participation or HUB Participation.

(a) If a Development's LURA requires the material participation of a non-profit or Historically Underutilized Business (HUB), the Department will confirm whether this requirement is being met throughout the development phase and ongoing operations of the Development. Owners are required to maintain sufficient documentation to evidence that a non-profit or HUB so participating is in good standing with the Texas Comptroller of Public Accounts, Texas Secretary of State and/or IRS as applicable and that it is actually materially participating in a manner that meets the requirements of the IRS. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If an Owner wishes to change the participating non-profit or HUB, prior written approval from the Department is necessary. In addition, the IRS will be notified if the non-profit is not materially participating on a HTC Development during the Compliance Period.

(c) The Department does not enforce partnership agreements or other agreements between third parties or determine fund distributions of partnerships. These disputes are matters for a court of competent jurisdiction or other agreed resolution among the parties.

§10.624. Events of Noncompliance.

Figure: 10 TAC §10.624 lists events for which a multifamily rental development may be found to be in noncompliance for compliance monitoring purposes. This list is not an exclusive list of events and issues for which an Owner may be subject to an administrative penalty, debarment or other enforcement action. The first column of the chart identifies the noncompliance event. The second column indicates to which program(s) the noncompliance event applies. The last column indicates if the issue is reportable on IRS Form 8823 for HTC Developments.

Figure: 10 TAC §10.624

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406197
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2015
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-2330

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10 TAC §10.610, §10.617

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC §10.610, concerning Tenant Selection Criteria, and §10.617, concerning Affirmative Marketing Requirements. These repeals are adopted in connection with the adoption of new 10 TAC Chapter 10, Subchapter F, §10.610, concerning Tenant Selection Criteria, and

§10.617, concerning Affirmative Marketing Requirements, which are adopted concurrently.

REASONED JUSTIFICATION. The repeals will allow for the concurrent adoption of new 10 TAC Chapter 10, Subchapter F, §10.610 and §10.617, which will clarify and improve compliance with federal Fair Housing requirements.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. No public comments were received relating to the repeal of these rules.

The Board approved the final order adopting the repeal on December 18, 2014.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2015
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-2330

♦ ♦ ♦

10 TAC §10.610, §10.617

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC §10.610, concerning Tenant Selection Criteria, and §10.617, concerning Affirmative Marketing Requirements, with changes to the proposed text as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7458).

The primary changes to the proposed rules include language clarifications and adjustments in response to comment. Revisions to the Tenant Selection Criteria rule were generally related to definitions of resident preferences, required occupancy standards and reasonable accommodations language, items related to differences between waitlists and application logs, and language to be required in non-renewal and termination notices. Revisions to the Affirmative Marketing Requirements rule were generally related to which version of the HUD 935.2A form should be used, definitions of outreach efforts, ways to consider limited English proficiency in the course of affirmative marketing, and receiving applications through means other than submission at the Development site. The adoption of the repeal of the previous §10.610 and §10.617 is being published concurrently with this adoption.

REASONED JUSTIFICATION. The adoption of §10.610, Tenant Selection Criteria, and §10.617, Affirmative Marketing Requirements, will clarify and improve compliance with federal Fair Housing requirements.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The Department accepted public comment between September 19, 2014, and October 20, 2014. Due to an administrative error in the original posting, the comment period was extended until November 14, 2014, by notice in the October 31, 2014, issue of the *Texas Register.* Comments were accepted from September 19, 2014, through November 14, 2014, with comments received from Darlene Sidebottom (1), Sandy Bolton (2), Patrick Barbolla (3), Jacqueline Kawas (4), Patricia Hensley (5), Cynthia Bast (6), Fred Fuchs (7), Sergio Amaya (8), Jen Joyce (9), Dyann Adair (10), Lori Erbst (11), John Hennenberger and Madison Sloan (12), and Micah Strange (13). Comments on §10.610, Tenant Selection Criteria, are listed before comments on §10.617, Affirmative Marketing Requirements. For each section, overall comments are listed first, followed by comments in order of the rule subsection.

§10.610, Tenant Selection Criteria

§10.610 - General Comment

COMMENT SUMMARY: Commenter 3 suggested that the ultimate result of strictly enforced Tenant Selection Criteria will result in marginally qualified applicants being denied admission and suggested that what the rule calls "vague" language provides for some discretion and allows the periodic marginal applicant to be admitted.

STAFF RESPONSE: Staff recommends no change. The Department suggests that the intention of the new rule is two-fold: 1) To guide Owners in creating criterion that is reflective of their actual screening processes and thereby ensure that Owners are consistently applying criteria as directed under Fair Housing law, and 2) To educate Owners on and correct common violations of Fair Housing, VAWA, and Section 504 laws. While there is some risk that "periodic marginal" applicants previously admitted may be denied, the Department reasons that any applicant should be able to determine whether or not they will apply at a Development based on a reasonable expectation that they will qualify under the Development's tenant selection criteria. If exceptions are sometimes made, the Department urges Owners to objectively define these exceptions and effectively screen in additional applicants who may not have applied assuming an exception would not be made.

COMMENT SUMMARY: Commenter 3 and Commenter 9 suggested that an effective date of the Tenant Selection Criteria section be deferred for 120 days to allow sufficient time for drafting, review, and enactment. Commenter 3 also suggested that all Developments have an opportunity to prepare and submit their Tenant Selection Criteria to TDHCA for approval and that pending review, Compliance Monitoring shall not hold a Development in non-compliance until TDHCA has reviewed and approved the Criteria or provided written recommendations or modifications based on a review of the Criteria. If a pre-approval process is not possible, Commenter 3 suggested that a Development shall not be deemed in non-compliance until Compliance Monitoring in the course of normal monitoring has notified the Development that its Criteria does not satisfy the rule and provide specific requirements that need to be addressed and submitted within the normal 90 day correction period. If corrections are made within the 90 day correction period, the Department would not record a violation on the Development's permanent record.

STAFF RESPONSE: Staff agrees with Comment that additional time for training and ease of implementation may be necessary

and suggests the following change: "(a) Effective April 1, 2015, Owners must maintain written tenant selection criteria that includes, at a minimum, the following information:"

While the Department does not have the staff or resources to approve individual plans prior to monitoring, staff is planning webinar trainings that will assist Owners and property management in understanding the new Rule requirements. As with any new rule, the Department will monitor for compliance at the time of an onsite monitoring visit and Owners will have 90 days to correct any findings assessed by the Department. However, some parts of the rule are clarifications of existing federal and state requirements. For example, if the Department receives a complaint regarding a denial of a reasonable accommodation request, it will process that complaint in accordance with 10 TAC §1.2.

§10.610 - Subsection (a) concerning general written tenant selection criteria

COMMENT SUMMARY: §10.610(a) - Commenter 7 suggested that subsection 10.610(a) of the proposed rule require that owners give a copy of their tenant selection criteria to applicants and their representatives upon request.

STAFF RESPONSE: Staff agrees but recommends the change be made under §10.610(d)(1)(C) instead of §10.610(a). Staff recommends the following change: "Have written waitlist policies and tenant selection criteria available in the leasing office or wherever applications are taken and provide a copy to applicants and their representatives upon request."

COMMENT SUMMARY: §10.610(a)(1) - Commenter 3 suggested that subsection (a)(1) of the proposed rule uses the phrase "any lawful resident preferences, restrictions, and requirements" and that these vague terms be clearly defined. Commenter 3 gave the example of USDA and HUD priority and displacement preferences.

STAFF RESPONSE: Staff recommends the following change: "(1) Requirements that determine an applicant's basic eligibility for the property, including any preferences or restrictions for resident selection, and requirements applicants must meet to be eligible for tenancy;"

COMMENT SUMMARY: §10.617(a)(3) - Commenter 1 noted that many developments change the name of screening companies frequently, that scoring systems may vary on the actual credit company scoring system, and that onsite staff is often not aware of how this is determined.

Commenter 2 noted that their current practice is to provide an adverse action letter from the screening company by hand delivery or by mail to the applicant. Each applicant is scored through the screening company on a points based system and management staff does not know why they are declined. This information can then be requested in writing to the screening company by the applicant.

STAFF RESPONSE: Staff agrees with Commenter 1 that changes in screening company names may result in needless updating of the Tenant Selection Criteria and notes that the third party information for any screening company (whether credit, residency history, or criminal history) will be provided in the rejection letter as described in (c)(2). Staff suggests a rule change as follows: "Applicant screening criteria including what is screened and what scores or findings would result in ineligibility. Applicants must be provided the names of any third party screening companies upon request;"

In response to Commenter 2, while staff is aware that screening scoring systems may vary, the score a resident must achieve to be eligible for residence at a property must be transparent along with factors that will result in a reason for denial. Letters notifying a prospective resident of application denial must also reference any factors that resulted in a reason for denial; if the denial is sent by the third party screening company to the applicant directly via an adverse action letter, the letter must also clearly list the reason(s) (e.g., credit scores, rental or criminal history findings) for which an applicant was denied. Under the proposed rule, the practice represented by Commenter 2 would not be acceptable, as the tenant does not receive information about why they have been declined.

§10.610 - Subsection (b) concerning prohibited tenant selection criteria provisions

COMMENT SUMMARY: §10.610(b)(1) - Commenter 3 suggested that subsection (b)(1) of the proposed rule needs clarification of the phrase "residency preferences" and suggested language be added to provide language for up front blanket exemptions for USDA properties and project based section 8 properties that require frequent jumping on the waiting list.

Commenter 6 suggested that the language in subsection (b)(1) prohibits an owner from utilizing tenant selection criteria that include residency preferences unless the preferences are due to exceptional circumstances approved by TDHCA and recommended a change as follows: "(1) Include residency preferences unless preferences are due to exceptional circumstances approved by TDHCA prior to initial lease up or at application or the property receives federal assistance and has received approval from HUD or USDA for such preference or such preference is otherwise permitted by federal law;"

STAFF RESPONSE: Staff recommends the following changes in response to comment: "(1) Include preferences for admission of persons who reside in a specific geographic area unless such preferences are approved by TDHCA or the property receives federal assistance and has received written approval from HUD or USDA for such preference."

In response to Commenter 6, staff suggests that removal of the word "residency" and removal of the phrase "due to exceptional circumstances" will remove the perceived barrier to residential preferences for artists. The Department has also removed language regarding specific points in time when the Department must approve specific geographic preferences in order to prevent barriers in the case of disaster or other unforeseen circumstances.

COMMENT SUMMARY: §10.610(b)(2) - Commenter 3 suggested that the phrase "Section 811 PRA Program" should not be included in section (b)(2), which lists forms of rental assistance for which a tenant should not be denied. Commenter 3 stated that the program should not be included since it is voluntary.

Commenter 7 suggested that subsection (b)(2) should specifically prohibit discrimination against voucher holders with vouchers issued by the United States Department of Agriculture Rural Housing Service under the Rural Development Voucher Program and the HUD Veterans Affairs Supportive Housing (VASH) program. The Commenter cited specific circumstances in which prospective applicants had been denied use of a Rural Development Voucher based on the fact that the program is administered

by USDA and because of other differences between the program and Housing Choice Voucher program.

STAFF RESPONSE: Staff agrees with Commenter 3 that Section 811 PRA is an optional program and will be attached to a property as a project based voucher. The Department recommends the following change: "(2) Exclude an individual or family from admission to the Development solely because the household participates in the HOME Tenant Based Rental Assistance Program, the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1-437), or other federal, state, or local government rental assistance program;"

In response to Commenter 7, staff suggests that the current provision is sufficient to advise property managers and owners of their obligations in TDHCA monitored properties and created the rule as stated to intentionally include all federal state and local government rental assistance programs, without risking excluding certain programs by not referring to them expressly by name. Any specific HUD or USDA voucher programs would be included by reference in this provision since both are federal government rental assistance programs.

COMMENT SUMMARY: §10.610(b)(6) - Commenters 4, 5, and 11 suggested that subsection (b)(6) be modified to read: "In accordance with the Violence Against Women Reauthorization Act of 2013, deny admission on the basis that the applicant has been a documented victim of domestic violence, dating violence, sexual assault, or stalking;" Commenter 4 suggested that adding "documented" before victim would discourage abuse of the rule, such as being granted a waiver of the development's specific resident requirements when the need might not actually exist and which might cause unnecessary cost that would result in an undue administrative and financial burden on the owner. Commenter 5 suggested that the rule as proposed would allow all persons to bypass certain eligibility and admission requirements by indicating that they are a victim of domestic violence and that in many cases the victim is approved and moves into the apartment but a short time later allows an abuser to move back in. Commenter 5 also suggested that adding the word "documented" could encourage "true" domestic violence victims to report the abuser and break the cycle of abuse, but that allowing anyone to say they are a victim could open the door for applicants/residents to use the rule as an excuse to get out of a lease and/or bypass community rules.

STAFF RESPONSE: Staff recommends no change. While HUD is still expecting to issue additional guidance on the Violence Against Women Reauthorization Act of 2013 (VAWA), staff does not agree that the Department must currently require Owners subject to VAWA to request documentation, though Owners may choose to document such information as directed under previous HUD guidance. HUD's definition of acceptable documentation that an applicant or tenant had been a victim of domestic violence, dating violence, sexual assault, or stalking was defined under the previous act. These items are reiterated under FR-5720-N-01 and include items such as HUD certification forms 50066 and 91066, a document signed by the applicant or tenant and a professional from whom the tenant has sought assistance, a Federal, State, tribal, territorial or local police report or court record, or a statement or other evidence provided by an applicant or tenant at the discretion of the owner or manager.

COMMENT SUMMARY: §10.610(b)(7) - Commenter 9 suggested under subsection (b)(7) that the revised rule requires that an existing tenant on a wait list for a 50% unit receive priority over another resident not already residing on the property and that the provision be stricken based on the fact that the unit would have to be held vacant while the existing household was re-qualified for eligibility for a lower rent unit. Commenter 9 respectfully requested that this remain the purview of the owner and not TDHCA.

Commenter 11 suggested under subsection (b)(7) that the rule could potentially displace current residents if a complex can't "help house in place residents with family size or financial burdens". Commenter 11 suggested that Owners should be able to transfer disabled households to suitable units before applicants on the waiting list and that the same is true for households with a financial burden or whose family size grows to exceed the unit size. The Commenter suggested the rule does not make sense, as even HUD allows for transfers of households before others on a waitlist.

STAFF RESPONSE: Staff recommends no change in response to comment. Staff reasons that Commenter 9's main objection to the section of the rule relates to additional time spent in re-qualifying a household. However, the Department does not agree that re-qualifying a household would necessarily require more time than initially qualifying a household for move in and determines that just as a household on the waitlist may be called in to submit and complete an application, an existing tenant may be asked to supply paperwork at the time another resident gives notice and a unit is known to become vacant.

In response to Commenter 11, staff disagrees that the proposed rule has the effect of potentially displacing current residents looking to transfer disabled households, households with a financial burden, or whose family size grows to exceed the unit size. The rule, as proposed, instead states that households not residing in the Development should not be prioritized over those already residing at the Development in instances in which existing tenant households are seeking units with a lower income restriction than the unit in which they currently reside. It does not prohibit any other action of a Development regarding other types of transfers.

COMMENT SUMMARY: §10.610(b)(8) - Commenter 7 suggested under subsection (b)(8) that HUD's "Keating Memo" on Fair Housing Enforcement of Occupancy Standards be referenced and that the subsection be revised as follows: "Require fewer than 2 persons per bedroom for each rental unit unless otherwise directed by local building code or safety regulations. Occupancy policies must meet the standards set forth in HUD's Notice titled *Fair Housing Enforcement - Occupancy Standards Notice of Statement of Policy,* set forth at 63 Federal Register 70256 (Dec. 18, 1998); and"

Commenter 9 suggested under subsection (b)(8) that TDHCA add language as follows: "Require fewer than 2 persons per bedroom for each rental unit unless otherwise directed by local building code or safety regulations or if the development is an SRO or offers Supportive Housing similar to an SRO."

STAFF RESPONSE: Staff agrees with Commenter 7 that occupancy policies should be established that are reasonable in relation to guidance published under the Fair Housing Enforcement Occupancy Standards Notice; however, the Department believes that referring Owners and Management Agents to the notice would be better suited to training under the new rule that can include best practices and reference materials. Staff suggests the following change: "Require unreasonable occupancy standards. If fewer than 2 persons (over the age of 6) per bedroom for each rental unit are required for reasons other than

those directed by local building code or safety regulations, a written justification must be provided; and"

In response to Commenter 9, staff believes that the changes proposed in response to Commenter 7 will address Commenter 9's concerns regarding SROs or supportive housing developments similar to SROs. SROs or supportive housing units that present circumstances in which less than 2 persons per bedroom reflects a reasonable occupancy standard should review local fair housing laws to ensure that such occupancy standards do not violate discrimination provisions related to any additional protected classes and provide written justification for such standards.

COMMENT SUMMARY: §10.610(b)(9) - Commenter 9 suggested under subsection (b)(9) that the section unintentionally restricts new owners from being able to clean up a property that has high crime caused by existing tenants. The Commenter recommends allowing new owners or existing owners of a property with new TDHCA funding to be exempt from the requirement to allow for evictions of tenants who have violated the new criteria during their tenancy so that they may evict for infractions to new leasing criteria. The Commenter suggested language be revised as follows: "Be applied retroactively except under circumstances in which prior criteria violate federal or state law; tenants who already reside in the development at the time new or revised leasing criteria are applied and who are otherwise in good standing under the lease must not receive notices of non-renewal based solely on their failure to meet the new or revised criteria. If the development has a new allocation of tax credits or other TDHCA funding, or if it is under new ownership, or if the required screening was never run before the tenant occupied the unit, the criteria may be applied retroactively, and a tenant may receive non-renewal or eviction notices, but only for infractions committed during their tenancy."

STAFF RESPONSE: Staff agrees that an unintended error was made in the proposed rule; staff also determines in concert with the entered comments that income eligibility needs to be considered in the event of new ownership and suggests the following changes: "Be applied retroactively except under circumstances in which market developments have received a new award of tax credits or TDHCA funds and a household is not income eligible under program requirements or prior criteria violate federal or state law. Tenants who already reside in the development at the time new or revised tenant selection criteria are applied and who are otherwise in good standing under the lease must not receive notices of termination or non-renewal based solely on their failure to meet the new or revised tenant selection criteria." Staff disagrees, however, that tenants should be held responsible for errors of previous ownership or management or previous failures to adequately enforce provisions of the lease. Rather, staff would expect any new policies or provisions to be instituted at the time of any change and make an effect on property activities through the regular process of proffering legal notices and eviction notices as lawful when behavior violates the lease. Revised tenant selection policies, as stated, must not be used to retroactively terminate or non-renew the lease of a tenant otherwise in good standing. Allowing such practices was specifically considered during the rule's creation in response to concerns from legal aid advocates that cited circumstances in which tenants in good standing had been non-renewed based on criminal convictions (some for criminal convictions that were over 10 years old) because of a property deciding to implement a "no felony" policy. Such practices have the effect of displacing tenants though the tenant in every way reasonably complied with the property's tenant selection and application policies at the time the initial decision to rent was made.

§10.610 - Subsection (c) concerning required tenant selection criteria provisions

COMMENT SUMMARY: §10.610(c) - Commenter 7 suggested under subsection (c) that the rule should be revised to provide limitations on how far back HTC owners may look (a reasonable look-back period) in considering an applicant's criminal history and that TDHCA should prohibit owners from re-screening any applicant who has been screened for criminal history by the local public housing authority (PHA). The Commenter suggested the following language: "Owners who choose to screen for criminal history must use only conviction information and must apply reasonable criminal history look-back periods in determining whether to admit an applicant with a criminal conviction. Owners may not deny admission to applicants with section 8 housing vouchers who have been screened for criminal history by the local public housing authority and approved for participation in the voucher program." The Commenter cited several examples reflective of criteria and policies in use by HTC developments that he believes create barriers to HTC housing for low income renters with criminal histories, many of which the Commenter stated are minority persons with disabilities. The Commenter reasoned that since Texas has adopted standards that require HTC owners to lease to voucher holders that he believes that HTC owners therefore meet the definition of "federally assisted housing" and must comply with requirements under 42 U.S.C.A §§13661, 13662, and 13663 which require reasonable look-back periods.

STAFF RESPONSE: Staff recommends no change. Staff suggests that such change would be substantive and that including language regarding "reasonable look-back periods" would present significant issues for enforcement monitoring and require TDHCA to determine what is "reasonable" under HUD's guidance without HUD having promulgated a clear answer. Additionally, the Department suggests that the Section 8 voucher holder screening process varies among public housing authorities and such screenings may be similar or different from screenings used by owners of TDHCA monitored properties.

COMMENT SUMMARY: §10.610(c)(1) - Commenter 5 suggested under subsection (c)(1) that avoiding the use of vague terms puts the owner in a position where they will have to clearly define such terms. In defining such terms, Commenters 5 and 8 asked whether the State will accept the Owner's definition or will offer its own definition.

Commenter 8 suggested that to clearly define every circumstance that could constitute a negative rental history would be rather lengthy and that a property management company should have their own policy on what they deem as negative rental history and have the ability to look at each applicant's rental history to determine if it is negative or not based on the circumstance. Commenter 8 suggested that using the term negative rental history should be acceptable as long as a property management company is not discriminating against applicants that have negative rental history based on one of the protected classes.

STAFF RESPONSE: Staff recommends no change in response to Comment. Staff agrees with Commenter 5 that avoiding the use of vague terms puts the owner in a position where they will have to clearly define such terms. Owners must create objective tenant eligibility criteria that can be consistently and uniformly

applied. Staff expects Owners to define any vague terms suggestive of reasons for denial; for example, if an Owner expects to use the terms "negative rental history", an Owner will be expected to define any elements that result in an Owner's determination of "negative rental history", such as third party screenings that result in eviction for non-payment of rent, amounts owed for property damages, or poor rental references, etc.

In response to Commenter 8, staff suggests that property management companies must have their own policy that transparently details items that will result in automatic denials. If mitigating factors will be considered, the property management company must describe what types of items will be considered.

COMMENT SUMMARY: §10.610(c)(3) - Commenter 1 stated that the adoption of subsection (c)(3) of the rule will result in circumstances in which "Every known felon would apply with a disability and obtain a waiver!" Commenters 1 and 2 noted that this section of the rule would contradict their existing tenant selection policies regarding criminal history and evictions.

Commenter 3 suggested that the word "convictions" should be removed from the proposed rule because to allow a convicted criminal to claim that his/her disability caused the conviction is not only bad public policy but endangers the other residents.

Commenter 4 suggested that the subsection be modified to read: "Provide that reasonable accommodations in the form of waivers of tenant eligibility may be considered where convictions or prior tenancy references can be attributed to a documented disability or to documented domestic violence perpetrated against the applicant; if additional mitigating factors will be considered, include how such decisions will be made and what must be provided for consideration."

Commenter 8 asked under subsection (c)(3) who should decide that it is okay to allow an applicant that has a criminal history on their record to be granted an exception because he/she is a recovering alcoholic/drug addict and asked why the applicant should be granted a "pardon" from previous actions because recovered alcoholics and drug addicts can be covered under the term disabled. Commenter 8 additionally asked what happens if a resident then becomes a current alcoholic or drug addict while residing on the property and suggested that an eviction would then have to be filed because they are no longer disabled and the tenant selection criteria states that the property would deny someone with that felony under normal circumstances. Commenter 8 then asked, "Will you need to monitor them to ensure that they do not become current alcoholics/drug addicts while they are residents?"

STAFF RESPONSE: Staff does not agree with Commenters 1 and 2 that the proposed rule will "lead every known felon to apply with a disability and obtain a waiver". The Department is aware that the adoption of this rule will require many Developments to amend their leasing criteria. However, the Department believes that such changes are necessary to ensure that barriers to affordable housing, particularly for persons with disabilities, are appropriately mitigated through education and enforcement. However, staff also reasons that a portion of this provision is reiterated in (b)(6) and that the purpose of the rule may be widened and better served by the following change: "Provide information on how reasonable accommodations for persons with disabilities may be requested by an applicant during the application process and provide notice to applicants about VAWA protections. The Development must provide a timeframe in which it will respond to a request;"

In response to Commenters 3 and 8, staff also suggests that there are circumstances in which a person with a disability may request a reasonable accommodation to tenant eligibility criteria, such as circumstances in which criminal convictions relate to a person's chronic mental illness or past history of alcoholism for which a tenant has appropriately sought treatment and can successfully demonstrate appropriate supports and current positive rental history or references. Staff encourages Owners subject to Section 504 requirements to review their processes for receiving and considering such requests and discuss such processes with legal counsel that can appropriately advise them.

Reasonable Accommodations requests, in response to Commenter 8, must be reviewed on a case by case basis. Approval of such requests does not mean that a resident of an affordable housing community does not have an equal responsibility to abide by the provisions of the lease agreement. Staff suggests that if a person was provided such an accommodation, the person would not be evicted for "no longer being disabled" but would be evicted only in the event that they, like any other tenant, have not complied with the provisions of their lease. As a reminder, disability discrimination provisions do not extend to persons who currently use illegal drugs or persons with or without disabilities who present a direct threat to the persons or property of others. If a lease violation constitutes action by the landlord, the landlord may consider these factors.

The Department suggests, in response to Commenter 4, that documentation provisions related specifically to disability are covered in applicable laws such as the Fair Housing Act and Section 504 and staff does not intend to restrict any rights available under such laws. Additionally, as described in response to the Commenter's similar suggestions on (b)(6), the Department will follow the Act and HUD's guidance in relation to VAWA.

COMMENT SUMMARY: §10.610(c)(6) - Commenter 3 suggested under subsection (c)(6) that the rule's use of the phrase "elderly Development" is vague and that the term should be defined.

STAFF RESPONSE: Staff recommends the following change: "All Developments operating as Housing for Older Persons under the Housing for Older Persons Act of 1995 as amended (HOPA) and in accordance with a LURA must list specific age requirements and continue to meet qualifying criteria under the HOPA to maintain such designations;"

COMMENT SUMMARY: §10.610(c)(7) - Commenter 3 suggested under subsection (c)(7) that there is a distinction between federally financed housing (which excludes tax credit properties) and other properties as it relates to the application of specific requirements for service animals and that the section needs to be revised to clearly define which properties based on financing and date of construction are subject to which restrictions. Commenter 3 suggested FHEO-2013-01 for review in a discussion of Fair Housing and ADA requirements.

Commenter 4 suggested under subsection (c)(7) that the word "assistance" be replaced with the word "companion" in the following statement: "Provide that specific animal, breed, number, weight restrictions, pet rules, and pet deposits will not apply to households having a qualified service/assistance animal(s);". The Commenter suggested that using the word "assistance" instead of the word "companion" as used in the draft tenant brochure would create an additional definition owners would need to accommodate.

Commenter 8 asked, under subsection (c)(7), why pet rules and pet deposits should be considered a part of the tenant selection criteria and stated that such items are addressed in the property's pet policy and that property management and residents with service/assistance animals are aware that a property's pet policy does not apply to them. The Commenter suggested that if such statements are required in a property's tenant selection criteria that it would also need to be spelled out on properties that do not allow pets and this would add unnecessary information for an application document.

Commenter 10 suggested under subsection (c)(7) that "on the restriction lift of specific animal, breed, number, weight restriction, pet rules, and pet deposit" that "it's important that residents maintain pet rules for the safety and sanitary conditions of the property and other residents. The service/assistance animals should be required to follow the same rules as those of other pets."

STAFF RESPONSE: Staff recommends no change in response to comment. Under the Fair Housing Act, to which all multifamily properties in the Department's portfolio are subject, assistance animals are defined as animals that are not pets. While the ADA has refined the definition and specific requirements for service animals, the Department of Justice Notice referenced by Commenter 3, FHEO-2013-01, concludes that the definition of "service animal" contained in ADA regulations does not limit housing providers" obligations to grant reasonable accommodation requests for assistance animals in housing under either the FHA or Section 504. In addition, under the FHA and Section 504, assistance animals are not considered pets. Therefore staff reasons that the rule as drafted provides acceptable guidance.

In response to Commenter 4, under Section 504 and the Fair Housing Act, the term "assistance animal" is most widely used, but staff cautions the commenter that persons with a disability may request a reasonable accommodation for service animals, assistance animals, companion animals, or emotional support animals as directed under the Fair Housing Act and Section 504 regardless of the terminology expressly used in the rule.

In response to Commenter 8, the Department desires such statements to be added for the express purpose that they will be spelled out (even on properties that do not typically allow pets) to decrease barriers to housing for persons with disabilities who may not be aware of protections for service/assistance animals. The Department also disagrees that it should operate on the basis that property management and residents with service/assistance animals are already aware that a property's pet policy does not apply. The Phase 2 Analysis of Impediments completed by the state of Texas noted one goal and two impediments directly related to statewide knowledge of fair housing laws and specifically addressed the need for more information on reasonable accommodations, a recommendation which is related to this provision. The Department reasons that if a development seeks to reference an existing pet policy that already includes such language and make such policy available to applicants, the development may do so and remain in compliance with the rule. Where no pet policy or other document detailing this item exists, developments should expressly include it in tenant selection criteria.

In response to Commenter 10, the Federal Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and ADA, service/assistance animals are not considered "pets"; conditions and restrictions that housing providers apply to pets may not be applied to service animals. This guidance is made clear under Section I of HUD Notice FHEO-2013-01. Service/assistance animals must be permitted to accompany the individual with the disability to all areas of a Development where persons are normally allowed to go, unless (as provided by HUD guidance): 1) the animal is out of control and its handler does not take effective action to control it; 2) the animal is not housebroken (i.e., trained so that, in the absence of illness or accident, the animal controls its waste elimination); or 3) the animal poses a direct threat to the health and safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices, and procedures.

§10.610 - Subsection (d) concerning waitlists, application rejections, and termination or non-renewal notices

COMMENT SUMMARY: §10.610(d)(1)(B) - Commenters 1, 2, and 11 suggested under subsection (d)(1)(B) that the application will be completed only when a unit becomes available that can be assigned and that the waitlist information therefore collected would only be basic in nature, such as name, contact information, special needs or disabled status, and that demographics and voucher status would be a moot point. Commenter 3 also suggested that there is no need to include voucher status on the waiting list and that it should be removed since holding a voucher is not relevant to determining eligibility or qualifications for occupancy.

Commenter 11 also suggested that the Department define "completed application process" and described the differences between entering applicants on a waitlist and processing an applicant's application for tenancy.

STAFF RESPONSE: Staff agrees with the Commenters 1, 2, 3, and 11 that some of the suggested items are only available when the household fills out a full application and that the rule, as written, confuses information collected for the waitlist and information collected at the time of full application, which are separate and distinct processes - staff also reasons that if applications are accepted, application data will already be provided as tenant household data, leaving only the consideration of rejected applicant data. To resolve confusion and avoid duplication of data efforts, staff recommends the following change: "(B) The Development must keep a log of all denied applicants that completed the application process and maintain a file of all rejected applications for the length of time specified in the applicable program's recordkeeping requirements. The log must list basic household demographic and rental assistance information, if requested during any part of the application process, along with the specific reason for which an applicant was denied, the date the decision was made, and the date the denial notice was mailed or hand-delivered to the applicant. This information may be kept in conjunction with the Development's waitlist or as a separate log. The log must be made available to the Department upon request."

COMMENT SUMMARY: §10.610(d)(2) - Commenter 1 suggested that a 30-day determination under subsection (d)(2) to help with lease up developments and ineligible applicants should be provided to any rejected or ineligible applicant/household that completed the application process rather than the 7 day period recommended by the Department. Commenter 2 suggested that a seven day period is not very long if an applicant were to bring in other information once rejected to appeal the decision and during a lease up this time may be even shorter.

STAFF RESPONSE: Staff recommends no change. Furnishing application denials within 7 days of the time a denial is known will ensure that households in need of affordable housing have time

to search for and apply at alternate Developments in the event they are rejected under a Development's screening criteria.

In response to Commenter 2, the Department reasons that the seven day period only relates to the time in which management must issue the notice of the initial denial to the household but does not prescribe a period for the consideration of appeals or other information brought to the attention of an Owner or Property Manager.

COMMENT SUMMARY: §10.610(d)(3) - Commenter 1 and Commenter 2 stated, under subsection (d)(3) that non-renewal and termination notice provisions included in the Rule are already provided in the TAA lease and Redbook forms.

Commenter 3, under subsection (d)(3), objected to the phrase "or contest the threat of termination or non-renewal".

Commenters 6 and 8 suggested that subsection (d)(3) infers that the only way a development can non-renew a resident is through the judicial process, which is costly and lengthy. The Commenter reasons that it is completely understandable and necessary to go through a judicial process to sever a binding agreement but if the lease is ended and the property chooses to non-renew for good cause it should not be necessary to enter into the judicial process. The Commenter also stated that it should not be the property's responsibility (as the plaintiff) to inform the resident (as the defendant) on the appeals process as this is not standard practice in any type of lawsuit.

Commenter 7 suggested that the proposed language in subsection (d)(3) of the draft rule is a marked improvement that will help ensure compliance with federal law and made two additional suggestions for additional items. The Commenter suggested adding the following language in (d)(3) which is currently required in HUD-assisted housing and appears in the HUD Model Lease for Subsidized programs: "The notice must inform the tenant of the right to request a meeting with management to discuss the proposed non-renewal or termination of tenancy. If an eviction is initiated, the landlord must rely only upon the grounds cited in the termination notice." The Commenter reasoned that evictions can frequently be resolved with a meeting between the tenant and management and that informal resolution should be encouraged. The Commenter also suggested that a subsection (d)(4) be added to read as follows: "Owners must set forth the specific grounds for non-renewal or termination in the eviction petition (or attach a copy of the termination notice) filed in the justice of the peace court and also provide the court with a copy of any lease addendum setting forth the good cause requirement." The Commenter suggested that owners should not be able to file an eviction petition alleging "holdover at end of lease non-renewal" and that requiring a petition to state grounds for non-renewal will put the court on notice that the landlord must prove the existence of good cause for non-renewal. The Commenter also suggested that unless the good cause standard for termination of tenancy is stated in the lease agreement, the court may not be aware of the good cause standard's existence in the lease addendum. The Commenter cited experiences in which landlords are required to file a copy of the lease agreement but courts may not be aware of additional lease addenda that are not filed with the lease agreement. The Commenter suggested that if the good cause standard is not included in the lease itself then the court will assume no such standard applies.

STAFF RESPONSE: Staff understands the objection of Commenter 3 and agrees with Commenters 6 and 8 that a development can non-renew for good cause without engaging the judicial process. The Department suggests revising this section as follows: "(3) Provide in any non-renewal or termination notice as allowed under applicable program rules a specific reason for the termination or non-renewal. The notification must be delivered as required under applicable program rules, include information on rights under VAWA if the development is subject to VAWA, and provide how a person with a disability may request a reasonable accommodation in relation to such notice. The notification must also include information on the appeals process if one is used by the property."

In response to Commenter 7, the Department reasons it may be able to provide the idea of tenant meetings with management as a best practice, but at this time declines to mandate such practices. Additionally, the Department would suggest that many of its Owners already work diligently with tenants to preserve tenancy and avoid the eviction process but that Owners are also responsible for ensuring the safety and peaceful enjoyment of other residents in a development community; where such actions place the rights of others in such communities in jeopardy, Owners are expected to respond in accordance with their responsibilities under the lease. In response to the suggestion for subsection (d)(4), the Department reasons that tenants are provided copies of all lease addendums at the time of move in and would receive termination and non-renewal notices at the time such notices are delivered by management.

In response to Commenters 1 and 2, the Department suggests that the added language in non-renewals or termination notices serves to better inform tenants of their rights at the time such notice is received and includes information about reasonable accommodations for persons with a disability. The TAA leases that the Department has seen do not include this language.

§10.617, Affirmative Marketing Requirements.

§10.617 - General Comment

COMMENT SUMMARY: Commenter 3 generally suggested that language be added to the rule stating that this section is based on obligations on the Department by reason of its acceptance of CDBG, HOME, and Section 811 PRA funds and not any legislative requirements under the low income housing tax credit program.

STAFF RESPONSE: Staff recommends no change. The Affirmative Marketing Rule has been included in the Department's monitoring practices for all multifamily developments, including the HTC program, for several years. The Department has the authority to require it and desires to affirmatively further fair housing objectives in all department programs.

COMMENT SUMMARY: Commenter 3 generally suggested that hundreds of properties receive financing from TDHCA and either USDA and/or HUD and questioned the benefit of having duplicate monitoring for requirements that differ in subtle ways. As a result, the Commenter suggested that developments completing an Affirmative Marketing Plan under USDA or HUD be made exempt from the TDHCA rule.

STAFF RESPONSE: Staff recommends no change. The Commenter's request would lead to a substantial change under the current comment process but staff will explore entering into an MOU with HUD and/or USDA and may propose such an amendment in future rulemaking. Staff suggests that TDHCA's revised requirements should not further complicate or serve to duplicate efforts, as the Department is required to monitor for federal requirements as mandated by certain federal assistance programs

and does not consider any of the rule requirements to be in conflict with HUD's or USDA's expectations and guidance. Staff, instead, expects the revised requirements, by way of the Affirmative Marketing Tool, to simplify affirmative marketing processes by assisting Owners and property managers in defining a "market area" and identifying "least likely to apply" populations and thereby creating a more efficient and meaningful process that will allow Owners to focus on outreach.

COMMENT SUMMARY: Commenter 3 generally suggested that any demographic data or tools provided by the Department be related to income eligible households and that unless data provided by the Department is based on percentages of racial groups that are income eligible, the data is meaningless if the purpose is to have a meaningful targeting of advertising. The Commenter also suggested that USDA and Section 8 landlords are also prohibited from renting to non-United States citizens and undocumented aliens and that it is a waste of the development owner's time and money to outreach to a segment of the population that is over income and would not meet basic eligibility criteria.

STAFF RESPONSE: Staff recommends no change. While HUD defines the purpose of affirmative marketing as ensuring that individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of race, color, religion, sex, disability, familial status, or national origin. HUD has not issued guidance on how to consider income eligibility in its Affirmative Fair Housing Marketing Plan or given clear instructions on how to consider income eligibility in the plan's guiding instructions or worksheets. The Department believes that the tool, as described in the proposed rule, will assist Development Owners and property managers in appropriately analyzing census and market area data as currently directed by HUD to identify "least likely to apply" populations and ensuring that such populations are aware of rental opportunities.

COMMENT SUMMARY: Commenter 3 generally suggested that for all properties, or for at least any property receiving USDA financing, that the market area should be defined as the Census tract, the city as the market area, and the county as the expanded market area. The Commenter suggested that while it may be a "feel good situation" for the Department to cause others to advertise in a wide geographic area, the plan is destined to fail if it is based on having a person relocate 40-50 miles away. The Commenter suggested that rather than require Development Owners to conduct such actions, the Department should place the obligation on itself to expand its actions and not relegate such advertising to Development Owners.

STAFF RESPONSE: Staff recommends no change. For existing properties, the rule currently contemplates an analysis of tenant pool data compared to either an MSA or County (though properties with less than 40 units, unoccupied properties, or properties with data not sufficiently complete to yield an accurate profile of the populations a Development is serving would use Census Tract data instead of tenant pool data as a basis for comparison). Staff considered various bases of comparison in looking at the rule, but determined that MSAs and Counties were most appropriate due to the various relative sizes of census tracts and a likelihood that advertising only within census tracts may fail to appropriately realize the benefits of affirmative marketing for certain populations. For example, persons with disabilities may very well be willing to relocate 40-50 miles to live in an accessible unit that meets their needs, especially in rural areas where accessible housing is a scarce resource. The Department, in response to its own obligations, is also currently in the process of creating website mock ups for and reviewing proposed changes to its Vacancy Clearinghouse tool that will hopefully assist both the Department and property Owners in adequately advertising affordable housing vacancies.

COMMENT SUMMARY: Commenter 3 generally suggested that the Department should hold the proposed rule in abeyance pending a decision from the Supreme Court in the Inclusive Properties case. The Commenter suggests that the proposed rule as drafted imposes racial quotas on occupancy, i.e., once the quota is achieved then outreach may cease and the thrust of the rule as a whole is nothing more than acceptance of disparate impact theory. The Commenter reasoned that rather than implement a theory the Department is contesting in court, the Department should defer any approval pending the Supreme Court's decision, which should be by the end of June, 2015.

STAFF RESPONSE: Staff disagrees. The rule does not impose "racial quotas".

COMMENT SUMMARY: Commenter 3 generally suggested that the proposed rule requires significant "racial profiling" and that until a "racial quota" is met, the development is required to seek out media and organizations that "actively engage with the identified populations". The Commenter stated "phrased for what it is, this is racially profiling organizations and community contacts." The Commenter suggests that "the problem with racial profiling is that it is really meaningless when it comes to seeking tenants in affordable housing" and that "many racially identifiable organizations are not necessarily composed of income eligible individuals". The Commenter suggests that the direction of outreach and marketing should be to organizations that serve lower income households and that in many rural areas of Texas organizations serve all racial segments and are not "segregated". The Commenter suggests that in these areas "better practice would be to require outreach to individuals that are associated with non-segregated organizations since they are the ones most likely to relocate to an apartment that is not wholly occupied by members of their own race."

STAFF RESPONSE: Staff recommends no change. Owners are not prohibited from outreaching to organizations that serve lower income households and are encouraged to do so.

COMMENT SUMMARY: Commenter 3 generally suggested that regardless of steps taken by the Department, there will be those advocates that claim TDHCA and Texas has not taken sufficient steps to comply with advocate demands. The Commenter suggested that HUD will soon publish its final rule on Affirmatively Furthering Fair Housing and that this proposed rule will render meaningless any steps taken by the Department in this rule and outlaw many reasonable zoning ordinances in Texas because of Disparate Impact if Texas continues to accept CDBG, HOME, and Section 811 PRA funding from HUD. The Commenter suggests that rather than seeking meaningless appeasement that will enable the Department to continue to obtain federal financing, that the rule be postponed considering release of HUD's final Affirmative Fair Housing Rule and a full study of its impact on Texas, including the response of Texas leadership to the Rule.

STAFF RESPONSE: Staff suggests that HUD's proposed rule, regardless of whether and when it is finalized, will not render meaningless the steps taken by the Department in this rule. However, Staff agrees that additional time for training and ease of implementation may be necessary and suggests the following change: "(a) Applicability. Effective April 1, 2015, compliance

with this section is required for all Developments with five (5) or more total units to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166."

COMMENT SUMMARY: Commenter 12 generally suggested that affirmative marketing is necessary to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166 and registered support in TDHCA's proposed revision of Section 10.617, stating that "the failure to effectively affirmatively market to persons least likely to apply can lead to the exclusion of certain classes of persons for an affordable housing property. One need look no further than the outcome of marketing efforts seen in the ethnic and racial composition documented in the Housing Sponsor Report to see the need for a more effective affirmative marketing effort." The Commenter suggested, however, that TDHCA's proposed rule omits provisions requiring collection and reporting of race and ethnicity data of all applicants for the housing and race and ethnicity of all individuals who visit the project or subdivision in person, which the Commenter suggests are a critical data reporting requirement included in the HUD Affirmative Fair Housing Marketing Plan and must be required to assess the effectiveness of the marketing plan and compliance with fair housing laws.

STAFF RESPONSE: Staff recommends no change. Staff suggests that the Department has moved to require Developments to keep rejected application logs which must include basic information on household demographics.

COMMENT SUMMARY: Commenter 8 generally suggested that it is obvious that TDHCA's thoughts behind the proposed rule changes are to ensure that everyone is treated equally. The Commenter asked why inequity concerns are not just addressed with the developments that are not following the current procedures and why TDHCA does not just allow HUD to address any fair housing violations with the offenders. The Commenter suggested that this would allow the rest of the developments to continue to provide the services to the residents that they are required to provide and are currently providing rather than increasing costs for developments and causing money currently being used to enhance a property and its services to be reduced. The Commenter then suggested that "Residents would enjoy one extra resident activity versus receiving an eight page brochure that explains to them something they could find online. These additional expenses will have to be taken from somewhere."

STAFF RESPONSE: Staff recommends no change. The Department's rules are appropriate for a government agency that administers and monitors federal and state funds in compliance with prohibited discrimination provisions and its HUD mandate to certify that it is affirmatively furthering fair housing. The Department also suggests that any failure to provide resident activities that a Development is required to provide in accordance with its LURA may result in a finding of non-compliance as otherwise provided in the Uniform Multifamily Rules, Subchapter F.

§10.617 - Subsection (c) concerning plan format.

COMMENT SUMMARY: §10.617(c) - Commenter 5 generally noted under subsection (c) that Owners are currently allowed to use the expired HUD form 935.2A for affirmative marketing purposes. The commenter asked whether this will still be acceptable to TDHCA. Commenter 9 suggested that TDHCA make it clear that Owners are still allowed to use the version of HUD Form 935.2A that expired on 1/31/2010 and if not, that Owners not be required to complete Worksheets 1 and 2 on the updated form. Commenter 9 also suggested a clarification that HUD instructions do not apply unless otherwise stated in the rule.

STAFF RESPONSE: Staff seeks to resolve confusion regarding this statement by suggesting the following change under subsection (c): "(c) Plan format. Owners are encouraged to use any version of HUD Form 935.2A to meet Affirmative Marketing requirements. Owners participating in HUD funded programs administered by the Department must use the version required by the program. The Department may make additional forms or tools available for use."

The addition of "any version" should expand the potential for HTC Owners that are not receiving HUD funds to use any version of the HUD promulgated form since HUD does not review the form for HTC Developments and the Department is primarily seeking planning information related to an analysis that its own promulgated tool will perform. TDHCA does not agree that a clarification that HUD instructions do not apply is warranted or necessary given an Owner's ability to choose between form versions as suits their specific program purposes.

§10.617 - Subsection (d) concerning determinations of populations "least likely to apply".

COMMENT SUMMARY: §10.617(d)(1) - (4) - Commenter 1 and Commenter 2 suggested under subsection (d)(1) - (4) that the underrepresentation threshold of 20% in comparison to the census tract is too high. Commenter 2 suggested that the calculation information needs to be simplified due to the fact that it will otherwise cause a significant amount of errors on site. Commenter 1 suggested, as an alternative, a comparison to the Zip Code of the development using a 3% - 5% ratio.

STAFF RESPONSE: Staff recommends no change. The 20% underrepresentation comes from HUD's definition of a minority concentrated area which can be found in many of HUD's NOFAs and was reiterated in the demographic analysis used in the State's Phase 2 Analysis of Impediments (Section 1, page 1). Zip Code areas are not feasible substitutes for census tracts because of their potential to include a very large comparison area that may fail to address smaller community or neighborhood area circumstances affecting persons least likely to apply, particularly in small cities or rural areas, where a Zip Code area may encompass an entire city or county area. In response to Commenter 2, the Department is creating an Affirmative Marketing Tool which will allow a Development manager to enter a CMTS number and generate a list of "least likely to apply" populations the Development should be including in its affirmative marketing efforts. Screenshots of the tool were published in the Board Book in preparation of the October 9, 2014, TDHCA Board meeting.

COMMENT SUMMARY: §10.617(d)(5) - Commenter 9 suggested under subsection (d)(5) that the draft rule states the online tool will work for "paragraphs (1) - (2) of this subsection." The Commenter asks that the rule be revised to reflect that the tool work for paragraphs (1) - (4) to include data needed for established developments.

STAFF RESPONSE: Staff agrees that the tool, as currently completed, can be used in evaluating data for both new and existing developments. Staff suggests the following changes: "(5) The Department will develop and maintain an online tool for performing the comparisons required by paragraphs (1) - (4) of this subsection, and an Owner may rely on analysis required under paragraphs (1) - (4) (but not an analysis made pursuant to subsection (e) of this section) made correctly using this tool. The Department may update the tool more frequently than an Owner is

required to review and/or revise their Affirmative Marketing Plan pursuant to subsection (g) of this section. Provided an Owner is in compliance with subsection (g), an Owner is not required to update their plan as updates to the Department's tool are made available."

§10.617 - Subsection (f) concerning marketing and outreach.

COMMENT SUMMARY: §10.617(f)(1) - Commenter 3 suggested under subsection (f)(1) that the rule's language regarding required outreach to "public gathering spaces in areas where such populations are well represented" and its references to "networking" are confusing and lack clarity.

Commenters 3, 5, and 11 suggested under subsection (f)(1) that TDHCA better define "special methods". Commenter 9 suggested that clarification be added that Owners are not required to perform any particular outreach methods outlined in the section and add "if applicable" to the last part of the sentence.

STAFF RESPONSE: Staff agrees that the language in the subsection requires better definition. Staff suggests the following changes: "(1) The plan must include special outreach efforts to the 'least likely to apply' populations through specific media, organizations, or community contacts that work with least likely to apply populations or work in areas where least likely to apply populations live."

In response to Commenters 3, 5, and 11, the Department suggests that staff does not wish to limit the ways owners might engage in special outreach efforts by including a strict definition. For example, while staff does not generally believe that sending a flyer to the chamber of commerce sounds special or dynamic, staff agrees that circumstances or the fruitful results of such marketing could prove otherwise. Generally, however, staff suggests that "special outreach efforts" might need to move beyond provision of a flyer to successfully attract groups identified as least likely to apply. In cases where least likely to apply groups remain underrepresented over time, an Owner may need to develop more creative solutions such as hosting an evening open house in collaboration with other HTC developments at a community center in a census tract with a larger population of the underrepresented group(s), submitting unit vacancy announcements to community based organizations for publication in a monthly newsletter, or appearing at a community based organization function or a nearby PHA Section 8 briefing and networking with residents or employees who work with residents actively looking for housing placements. Staff is looking forward to providing best practices information and training with the roll out of a new rule and thereby being able to offer Owners and property managers new and creative ideas that may enhance current outreach efforts.

In response to Commenter 9, the Department suggests that adding the words "if applicable" to the last part of (f)(1) would infer that special outreach efforts are only applicable to some Developments and their marketing efforts, when in reality special outreach efforts should be made by all Developments in order to reach populations considered least likely to apply. Since all properties must affirmatively market to persons with disabilities, special outreach will always apply.

COMMENT SUMMARY: §10.617(f)(2) - Commenter 9 suggested that subsection (f)(2) is overly broad and includes too much outreach in areas within an MSA. The Commenter asked if the Department's intention is to require a Houston Development's outreach to include Galveston but not Houston and that the Department use the methodology outlined in HUD's instructions on page 6 of 8 of the form under Block 1e: "identify both the housing market area, and the expanded housing market area... An expanded housing market area is a larger geographic area, such as a Metropolitan Division or a Metropolitan Statistical Area, which may provide additional demographic diversity..." The Commenter suggested that this would allow for a more reasonable area as defined by the Owner.

Commenter 11 suggested that the MSA in large cities can include up to 5 counties and that "realistically someone is not going to move 3 to 5 counties away from their current location." Commenter 11 suggested that the rule require marketing to apply to a 15-20 mile radius of the property and that TDHCA add a link to the TDHCA website that applicants can go to that directs them to affordable housing in the area they want to live in.

Commenter 13 suggested that developments working with a Public Housing Authority may have a specifically defined service area and be administered by different agencies within the rest of the MSA and that it creates conflict if Houston Housing Authority or Harris County Housing Authority were marketing in Baytown Housing Authority's territory. The Commenter contended that while it is true that a resident in the MSA can apply to participate in any public housing authority program, guidance is requested on whether housing authorities can avoid unnecessary duplication of marketing efforts.

STAFF RESPONSE: Staff partially agrees and recommends the following changes to the rule under (f)(2): "Developments must utilize methods of outreach throughout the MSA or, where subdivided into a Metropolitan Division, such Division (for Developments located in an MSA) or county (for Developments not located in an MSA). Efforts can be made beyond these areas at the discretion of the Owner. While these areas may be very large, in many instances outreach in areas located in another county or across town are necessary to effectively reach the identified population."

The Houston-Baytown-Sugar Land MSA includes 9 counties and several cities, including Houston, which in and of itself is not classified by the Bureau of Labor Statistics as large enough to be subdivided into a "Metropolitan Division" as intended by the HUD directions the Commenter referenced. Only the Dallas-Fort Worth-Arlington MSA would meet the definition of a Metropolitan Division and is listed under its subdivided Metropolitan Division under OMB's MSA listings. The Department will also amend the data used in the Department's promulgated Affirmative Marketing Tool to reflect the Metropolitan Division for the Dallas-Fort Worth-Arlington MSA.

In response to Commenter 13, Housing Authorities may wish to work together to find community agency partners or broadly advertise within an MSA but staff agrees that any resident in the MSA can apply to participate in any public housing authority program and that marketing within the proposed scope will assist tenants in being aware of the full range of community options. In response to Commenter 11's suggestion for the TDHCA website, the Department already has a Vacancy Clearinghouse apartment search tool that provides this function and it has been added to the draft of the revised proposed Fair Housing Disclosure Notice.

COMMENT SUMMARY: §10.617(f)(3) - Commenter 4 suggested under subsection (f)(3) that it is unclear why TDHCA would require the use of translated advertisements and other marketing media automatically rather than based on need. Automatically translating every advertisement or other marketing

media would result in an undue administrative and financial burden to the owner. The Commenter gave an example of Middle Eastern and Asian languages that are comprised of many different dialects and languages and suggested that translating them all when there is no official request or need would be cumbersome and inefficient. The Commenter suggested the following revisions to the subsection: "(3) Developments must utilize methods of outreach that consider Limited English Proficiency in populations that are least likely to apply. Owners must translate advertisements and other marketing media for use with organizations identified in accordance with paragraph (2) of this subsection based on requests by the organization or by prospective residents."

Commenters 5, 8, and 11 suggested that the cost associated with the request would not be feasible and will put an undo strain on the development.

Commenter 5 suggested that the Department allow Owners to wait until requests for translation are made rather than assuming a need exists and that sufficient guidance is not available to determine which language should be selected for a least likely to apply group. Commenter 5 suggested that according to One World Nations Online that over 10 different languages could be represented for an Asian population and that requiring management to choose one based on limited knowledge is unrealistic.

Commenter 11 suggested that marketing the property in a large city within an MSA could mean translating for every language represented in 5 counties and suggested that incorrect translations could lead to legal and fair housing issues.

Commenter 8 suggested that unless a Development employs someone fluent in a particular language that a Development cannot ensure that the correct marketing information is being provided with wordage that will not violate fair housing requirements and requested information on how such a provision would be monitored.

Commenter 9 recommended deleting (f)(3) in its entirety so that LEP does not apply and instead only require a statement in Spanish as outlined under subsection (5).

STAFF RESPONSE: Staff partially agrees. The Department suggests the following change in relation to the submitted comments: "(3) Developments must consider how Limited English Proficiency may affect populations least likely to apply, including ways it plans to mitigate language barriers related to advertising and community outreach. Such information should be included in the Affirmative Marketing Plan as an additional consideration or as an attachment to the Plan."

COMMENT SUMMARY: §10.617(f)(4) - Commenter 3 suggested under subsection (f)(4) that the first sentence be revised as follows: "Development Owners must allow applicants to submit applications via mail or at the Development site or leasing office; if the Development is so electronically equipped, the Development may also allow applications to be submitted via email, website form, fax, etc. If the Development requires an application fee, the consideration of an application without payment of the application fee shall be deferred pending receipt of the application fee. Applications must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria. If the development chooses to use an electronic applications, prior approval from the Department is required to mitigate fraud, waste and abuse."

Commenter 8 suggested that apartment complexes do whatever they can to accommodate prospects to receive and return rental applications and that it seems "silly" to make a rule requiring such efforts. The Commenter understood from a roundtable discussion that the rule would be leaning towards providing the actual application in off-site locations and allowing prospects to return the application to the off-site location, which raised the Commenter's concerns regarding confidential information, inability to determine an order in which applications would be received, and misinformation being given, as well as additional expenses related to staff time providing and distributing applications.

Commenter 11 asked whether TDHCA will allow files to have electronic signatures instead of wet signatures and allow copies rather than originals in property files, which have been an issue with audit in the past.

STAFF RESPONSE: Staff agrees with Commenter 3's suggestions and suggests the following changes: "(4) Development Owners must allow applicants to submit applications via mail or at the Development site or leasing office; if the Development is electronically equipped, the Development may also allow applications to be submitted via email, website form, or fax. If the Development requires an application fee, the consideration of an application without payment may be deferred pending receipt of the fee. Applications must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria. If the development chooses to use an electronic application, prior approval from the Department is required to mitigate fraud, waste and abuse."

In response to Commenter 8, staff suggests that the rule does not require applications to be received in off-site community locations where property staff may not be present or able to collect such applications.

In response to Commenter 11, as already directed in the draft rule, if the development chooses to use an electronic application, prior approval from the Department should be sought and the Department will discuss methods of submission and appropriate processing procedures at that time.

COMMENT SUMMARY: §10.617(f)(5) - Commenter 1 suggested under subsection (f)(5) that rather than Spanish and English, contact information should only be in English unless specifically requested in Spanish. The Commenter stated that developments often do not have staff that can write Spanish, TDHCA may not review forms in Spanish, and that offering translated materials to Spanish speaking persons may have an implication for fair housing.

STAFF RESPONSE: Staff recommends no change. The Texas Department of Housing and Community Affairs, as a recipient of federal funds, is required to maintain a Language Assistance Plan that considers a four-factor analysis and defines actions that will be taken by the Department to ensure meaningful access to agency services, programs, and activities on the part of persons with Limited English Proficiency. TDHCA's plan identifies native Spanish-speaking individuals as specifically prevalent in the State of Texas. As the recipient of federal funds and in its effort to comply with its HUD certification requiring that the state affirmatively further fair housing, TDHCA passes on an expectation that language barriers be considered in its affirmative marketing rule to multifamily subrecipients in an attempt to adequately address barriers to affordable housing for populations considered least likely to apply. The Department does not agree

that offering contact information and information on requesting reasonable accommodations in both English and Spanish will have an impact on fair housing; in the reverse, the Department is concerned that the residents of the State of Texas, particularly the large numbers of residents who speak Spanish as their native language, be offered meaningful access to services, programs, and activities which includes basic information about how to apply for multifamily rental units.

§10.617 - Subsection (g) concerning timeframes.

COMMENT SUMMARY: §10.617(g)(1) - Commenter 1 suggested under subsection (g)(1) that due to possible delays in construction, beginning affirmative marketing six months prior to construction completion is excessive. In addition, Commenter 1 and Commenter 2 suggested that during lease up a property would not be able to determine who is least likely to apply since the property is not yet occupied. Commenter 11 suggested that a lot of properties do not open on their anticipated date of availability and that most properties do not receive financial funding until 60 days prior to lease up, which impedes their ability to appropriately market. Commenter 11 suggested that 60 to 90 days is more appropriate for a realistic start of affirmative marketing.

STAFF RESPONSE: Staff recommends no change. In draft rule provisions (d)(1) and (d)(2), Developments in initial lease-up, Developments with 40 units or less, or Developments in which demographic data is not sufficient to yield an accurate profile of the tenant population will use census data for the census tract in which the Development site is located for comparison with the MSA or County area (as opposed to Tenant Pool data).

In response to Commenter 11, the Department believes that beginning affirmative marketing six months prior to construction completion is essential in allowing sufficient time to find and build effective relationships with community organizations and groups that will assist the Owner in building a tenant pool reflective of the MSA or County area.

COMMENT SUMMARY: §10.617(g)(2) - Commenter 1 suggested under subsection (g)(2) that the current rule requiring the Affirmative Marketing Plan to be updated every five years and to be reviewed annually should remain and that updating the plan every two years seems excessive when census data is collected every 10 years for comparison.

Commenters 3, 4, and 11 suggested the current rule remain in effect, citing that TDHCA defer to the expertise of HUD and that TDHCA remain consistent with HUD form guidelines.

Commenter 9 suggested that the current HUD standard apply as outlined in HUD's September 24, 2014, Memo.

STAFF RESPONSE: Staff agrees that changes should be made to include HUD's guidance from the September 24, 2014, Memo and suggests the following changes: "(2) An Owner must update its Affirmative Marketing Plan and populations that are least likely to apply at least every two (2) years from the effective date of the current plan or, for HUD funded or USDA properties, as otherwise required by HUD or USDA."

The prior rule was created based on HUD's Affirmative Marketing Plan review practices; on September 24, 2014, HUD issued a revised memo regarding clarification on Affirmative Fair Housing Marketing Plans and guidance. The memo requires that an owner review an existing Affirmative Fair Housing Marketing Plan when one of three circumstances occur: (1) At least five years have elapsed since the last review; or (2) The local jurisdiction's Consolidated Plan has been updated; or (3) Significant demographic changes have occurred in the housing market area. In addition, as stated by Commenter 1, the current rule requires annual review of the Development's demographics in relation to the housing area. The assumption of this rule is that if changes were needed in relation to this annual review, the plan would be updated. The Department's new rule will actually serve to require this review process only every two years unless otherwise required by HUD or USDA for HUD funded or USDA properties.

§10.617 - Subsection (h) concerning biennial plan reviews.

COMMENT SUMMARY: §10.617(h) - Commenter 11 asked under subsection (h) whether TDHCA will provide a form or an example for a "biennial plan review".

STAFF RESPONSE: Staff recommends no change and believes that the biennial review is sufficiently explained in subsection (h)(1) - (2). Staff does not currently intend to produce a review form for this purpose.

COMMENT SUMMARY: §10.617(h)(1) - Commenter 11 suggested under (h)(1) that in certain areas of a City or of the State there are "pockets of cultural neighborhoods that have banks, hair salons, grocery store, doctors that speak and understand their culture. Therefore that is who will be represented in that apartment community. This requirement is unrealistic. For example, a Hispanic family will not typically move to an area that does not have accommodations (bank, grocery, hair salon, church) for them."

STAFF RESPONSE: Staff recommends no change and does not agree with the Commenter's statement that its requirements under §10.617 are unrealistic.

§10.617 - Subsection (j) concerning exceptions to affirmative marketing.

COMMENT SUMMARY: §10.617(j) - Commenter 11 suggested under (j) that the Department provide guidance on when a property can close their waiting list. The Commenter suggested that HUD has excellent procedures that might be helpful.

STAFF RESPONSE: Staff recommends no change but may examine this recommendation in future versions of this rule. The proposed change would be substantive, as the Department has not previously defined the circumstances under which a property can close their waiting list.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The new sections affect no other code, article, or statute.

§10.610. Tenant Selection Criteria.

(a) Effective April 1, 2015, Owners must maintain written tenant selection criteria that includes, at a minimum, the following information:

(1) Requirements that determine an applicant's basic eligibility for the property, including any preferences or restrictions for resident selection, and requirements applicants must meet to be eligible for tenancy;

(2) Procedures the Development uses in taking applications and opening, closing, and selecting applicants from the waitlist, including but not limited to how preferences are applied and procedures for prioritizing applicants needing accessible units in accordance

with 24 CFR 8.27 and considering applicants covered by the Violence Against Women Reauthorization Act of 2013;

(3) Applicant screening criteria including what is screened and what scores or findings would result in ineligibility. Applicants must be provided the names of any third party screening companies upon request;

(4) The manner by which rejections of applications will be handled, including timeframes and appeal procedures, if any;

(5) Occupancy Standards; and

(6) Unit transfer policies.

(b) The criteria cannot:

(1) Include preferences for admission of persons who reside in a specific geographic area unless such preferences are approved by TDHCA or the property receives Federal assistance and has received written approval from HUD or USDA for such preference;

(2) Exclude an individual or family from admission to the Development solely because the household participates in the HOME Tenant Based Rental Assistance Program, the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1-437), or other federal, state, or local government rental assistance program;

(3) Use a financial or minimum income standard for a household participating in a voucher program that requires the household to have a monthly income of more than 2.5 times the household's share of the total monthly rent amount. However, if a family's share of the rent is $50 or less, Owners may require a minimum annual income of $2,500;

(4) Exclude a household with person(s) with disabilities from admission to the Development because an accessible unit is not currently available or require a household to rent a unit that has already been made accessible;

(5) Require a household to provide specific medical or disability information other than the disability verification that may be requested to verify eligibility for reasonable accommodation or special needs set aside programs;

(6) In accordance with the Violence Against Women Reauthorization Act of 2013, deny admission on the basis that the applicant has been a victim of domestic violence, dating violence, sexual assault, or stalking;

(7) Prioritize households not residing in the Development over those already residing at the Development in instances in which an existing tenant household is seeking a unit with a lower income restriction than the unit in which they currently reside. *(Example:* A household residing in a 60% AMI unit is income qualified for a 50% AMI unit and wishes to be placed on the waiting list for a 50% AMI unit. The household should be entered on the waitlist using the same process as households not currently residing in the Development.); and

(8) Require unreasonable occupancy standards. If fewer than 2 persons (over the age of 6) per bedroom for each rental unit are required for reasons other than those directed by local building code or safety regulations, a written justification must be provided; and

(9) Be applied retroactively except under circumstances in which market developments have received a new award of tax credits or TDHCA funds and a household is not income eligible under program requirements or prior criteria violate federal or state law. Tenants who already reside in the development at the time new or revised tenant selection criteria are applied and who are otherwise in good standing under the lease must not receive notices of termination or non-renewal based solely on their failure to meet the new or revised tenant selection criteria.

(c) The criteria must:

(1) Avoid the use of vague terms such as "elderly," "bad credit," "negative rental history," "poor housekeeping," or "criminal history" unless terms are clearly defined within the criteria made available to applicants;

(2) Provide that the Development will comply with state and federal fair housing and antidiscrimination laws, including but not limited to consideration of reasonable accommodations requested to complete the application process as identified in Chapter 1, Subchapter B of this title;

(3) Provide information on how reasonable accommodations for persons with disabilities may be requested by an applicant during the application process and provide notice to applicants about VAWA protections. The Development must provide a timeframe in which it will respond to a request;

(4) Provide that screening criteria will be applied uniformly and in a manner consistent with all applicable law, including the Texas and Federal Fair Housing Acts, the Federal Fair Credit Reporting Act, program guidelines, and the Department's rules;

(5) Be reasonably related to program eligibility and the applicant's ability to perform obligations under the lease;

(6) All Developments operating as Housing for Older Persons under the Housing for Older Persons Act of 1995 as amended (HOPA) and in accordance with a LURA must list specific age requirements and continue to meet qualifying criteria under the HOPA to maintain such designations;

(7) Provide that specific animal, breed, number, weight restrictions, pet rules, and pet deposits will not apply to households having a qualified service/assistance animal(s); and

(8) Provide an effective date for the tenant selection criteria. Any amendments to the criteria require a new effective date.

(d) Owners of all multifamily developments must also:

(1) Maintain a written waiting list.

(A) The waitlist must be managed as described in the Tenant Selection Criteria;

(B) The Development must keep a log of all denied applicants that completed the application process and maintain a file of all rejected applications for the length of time specified in the applicable program's recordkeeping requirements. The log must list basic household demographic and rental assistance information, if requested during any part of the application process, along with the specific reason for which an applicant was denied, the date the decision was made, and the date the denial notice was mailed or hand-delivered to the applicant. This information may be kept in conjunction with the Development's waitlist or as a separate log. The log must be made available to the Department upon request;

(C) Have written waitlist policies and tenant selection criteria available in the leasing office or wherever applications are taken and provide a copy to applicants and their representatives upon request.

(2) Provide any rejected or ineligible applicant/household that completed the application process with a written notification of the grounds for rejection that includes the specific reason for the denial and references the specific leasing criteria upon which the denial is based within seven (7) days of the determination. Rejection letters

must include contact information for any third parties that provided the information on which the rejection was based and information on the appeals process if one is used by the property;

(3) Provide in any non-renewal or termination notice as allowed under applicable program rules a specific reason for the termination or non-renewal. The notification must be delivered as required under applicable program rules, include information on rights under VAWA if the Development is subject to VAWA, and provide how a person with a disability may request a reasonable accommodation in relation to such notice. The notification must also include information on the appeals process if one is used by the property.

§10.617. Affirmative Marketing Requirements.

(a) Applicability. Effective April 1, 2015, compliance with this section is required for all Developments with five (5) or more total units to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166.

(b) General. Owners of Developments with five (5) or more total units must affirmatively market their units to promote equal housing choice for prospective tenants, regardless of race, color, religion, sex, national origin, familial status, or disability and must develop and carry out an Affirmative Fair Housing Marketing Plan (or "Affirmative Marketing Plan") to provide for marketing strategies and documentation of outreach efforts to prospective applicants identified as "least likely to apply." In general, those populations that are least likely to apply may include: African Americans, Native Americans, Alaskan Natives, Asians, Native Hawaiians, Other Pacific Islanders, Caucasians (non-Hispanic), Hispanics or Latinos, and families with children. All Affirmative Marketing Plans must provide for affirmative marketing to persons with disabilities. Some Developments may be required by their LURAs to market units specifically to veterans or other populations.

(c) Plan format. Owners are encouraged to use any version of HUD Form 935.2A to meet Affirmative Marketing requirements. Owners participating in HUD funded programs administered by the Department must use the version required by the program. The Department may make additional forms or tools available for use.

(d) Determination of populations "least likely to apply." Owners must determine the populations "least likely to apply" (also "identified populations") using the methods identified in paragraphs (1) - (4) of this subsection. Owners may use the methods in paragraphs (1) and (2) of this subsection if the Development is not occupied, if the Development is in initial lease-up, if the Development is less than 40 total units, or the Owner determines that the demographic data on the tenant households and waiting list for the Development ("Tenant Pool") is not sufficiently complete to yield an accurate profile of the populations the Development is serving. Except in the cases of populations that must be the subject of affirmative marketing pursuant to LURA requirements and persons with disabilities, any populations that represent less than 1% of the total population of the county or MSA, as applicable, are not required to be considered "least likely to apply." To assist Owners in identifying least likely to apply populations, the Department shall make the tool described in paragraph (5) of this subsection available to Owners.

(1) New Developments located in Metropolitan Statistical Areas ("MSAs"). The Owner must compare the demographic data from the most recent decennial census for the census tract in which the development site is located to the demographic data of the entire MSA in which the development site is located. The comparison must be done for each of the populations identified in subsection (b) of this section using the percentage each group represents for the census tract and MSA. The Owner will identify any population in which the percentage representation in the census tract is more than 20% less than the same population's percentage representation in the MSA *(i.e.* a population is more than 20% underrepresented in the census tract as compared to the MSA as a whole).

(2) New Developments not located in MSAs. The Owner must compare the demographic data from the most recent decennial census for the census tract in which the development site is located to the demographic data of the county in which the development site is located. The comparison must be done for each of the populations identified in subsection (b) of this section using the percentage each group represents for the census tract and county. The Owner will identify any population in which the percentage representation in the census tract is more than 20% less than the same population's percentage representation in the county *(i.e.,* a population is more than 20% underrepresented in the census tract as compared to the county as a whole). Example 617(1), County data shows 80% of the population in the County is Non-White Hispanic; the new development's census tract shows that 40% of the new development's census tract is Non-White Hispanic. The development must market to the Non-White Hispanic population because the 40% of Non-White Hispanics represented in the census tract shows an underrepresentation of more than 20% *(e.g.,* it is lower than 64%, which is 20% of 80%) when compared with the County percentage (80% x 20% = 16%; 80%-16% = 64%). If the census tract showed evidence of 65% or more Non-White Hispanics in the area, the development would not market to the Non-White Hispanic population.

(3) Established Developments located in MSAs. The Owner must compare the demographic data of the Development's Tenant Pool to the demographic data of the MSA in which the development site is located. The comparison must be done for each of the populations identified in subsection (b) of this section using the percentage each group represents for the tenant pool and MSA. The Owner will identify any population in which the percentage representation in the Tenant Pool is more than 20% less than the same population's percentage representation in the MSA *(i.e.,* a population is more than 20% underrepresented in the tenant pool as compared to the MSA as a whole). *Example 617(2),* the Owner's tenant pool shows that 5% of the population in the development is African American and that 8% of the population in the MSA is African American. The development must market to African American populations because the 5% of African Americans represented in the development shows an underrepresentation of more than 20% (8% x 20% = 1.6%; 8% - 1.6% = 6.4%). If the development showed evidence of 6.4% or more African Americans in the tenant pool, the development would not market to the African American population. In a development with 150 units in this scenario, at least 6.4% or 10 residents must be African American to show that the population is adequately represented and should not be selected as a "least likely to apply" group requiring special outreach and marketing.

(4) Established Developments not located in MSAs. The Owner must compare the demographic data of the Development's Tenant Pool to the demographic data of the county in which the development site is located. The comparison must be done for each of the populations identified in subsection (b) of this section using the percentage each group represents for the tenant pool and county. The Owner will identify any population in which the percentage representation in the tenant pool is more than 20% less than the same population's percentage representation in the county *(i.e.,* a population is more than 20% underrepresented in the tenant pool as compared to the county as a whole).

(5) The Department will develop and maintain an online tool for performing the comparisons required by paragraphs (1) - (4) of this subsection, and an Owner may rely on analysis required under paragraphs (1) - (4) (but not an analysis made pursuant to subsection

(e) of this section) made correctly using this tool. The Department may update the tool more frequently than an Owner is required to review and/or revise their Affirmative Marketing Plan pursuant to subsection (g) of this section. Provided an Owner is in compliance with subsection (g), an Owner is not required to update their plan as updates to the Department's tool are made available.

(e) Other determinations of "least likely to apply." If the owner identifies other ethnic and/or religious groups that may be underrepresented and chooses to incorporate such group(s) into the Affirmative Marketing Plan, the Owner must perform and document a reasonable process by which the groups were identified.

(f) Marketing and Outreach.

(1) The plan must include special outreach efforts to the "least likely to apply" populations through specific media, organizations, or community contacts that work with least likely to apply populations or work in areas where least likely to apply populations live.

(2) Developments must utilize methods of outreach throughout the MSA or, where subdivided into a Metropolitan Division, such Division (for Developments located in an MSA) or county (for Developments not located in an MSA). Efforts can be made beyond these areas at the discretion of the Owner. While these areas may be very large, in many instances outreach in areas located in another county or across town are necessary to effectively reach the identified populations.

(3) Developments must consider how Limited English Proficiency may affect populations least likely to apply, including ways it plans to mitigate language barriers related to advertising and community outreach. Such information should be included in the Affirmative Marketing Plan as an additional consideration or as an attachment to the Plan.

(4) Development Owners must allow applicants to submit applications via mail or at the Development site or leasing office; if the Development is electronically equipped, the Development may also allow applications to be submitted via email, website form, or fax. If the Development requires an application fee, the consideration of an application without payment may be deferred pending receipt of the fee. Applications must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria. If the development chooses to use an electronic application, prior approval from the Department is required to mitigate fraud, waste and abuse.

(5) Advertisements and/or marketing materials used must include the Fair Housing logo and give contact information that prospective tenants can access if reasonable accommodations are needed in order to complete the application process. The contact information must be in English and Spanish, at a minimum.

(g) Timeframes.

(1) An Owner must begin its affirmative marketing efforts for each of the identified populations at least six months prior to the anticipated date the first building is to be available for occupancy. As a condition of an award to a new Development, the Board may require affirmative marketing efforts to begin more than six (6) months prior to the anticipated date the first building is to be placed in service; and

(2) An Owner must update its Affirmative Marketing Plan and populations that are least likely to apply at least every two (2) years from the effective date of the current plan or, for HUD funded or USDA properties, as otherwise required by HUD or USDA.

(h) Biennial Plan Review. The plan must include how, and by whom, data will be collected and evaluated, how often the plan will be re-evaluated, and how the re-evaluation will be completed. The Owner must review demographic data and household characteristics from the Tenant Pool relative to the county or MSA. If any identified population is or remains underrepresented by more than 20%, the Owner should determine whether the percentage of change is greater or less than when the Affirmative Marketing Plan was last evaluated. If, upon review of the Tenant Pool, the Owner determines that there has been no change (including negative change) or only a limited amount of success, the Owner must:

(1) Complete an evaluation of efforts to date (including a review of current advertising, outreach, and networking strategies and what, if any of the strategies used, has been successful) and gather a list of existing and new community resources available for use in revising the current Affirmative Fair Housing Marketing Plan; and

(2) Revise the Affirmative Fair Housing Marketing Plan to include a wider distribution area and/or new strategies for outreach and/or more frequent outreach efforts.

(i) Record keeping. Owners must maintain records of each Affirmative Marketing Plan and specific outreach efforts completed for the greater of three years or the recordkeeping requirement identified in the LURA.

(j) Exception to Affirmative Marketing. If the Development has closed its waiting list, Affirmative Marketing is not required. Affirmative Marketing is required as long as the Owner is accepting applications, has an open waiting list, or is marketing prior to placement in service as required under paragraph (g)(1) of this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406198
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2015
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-2330

CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 12, §§12.1 - 12.10, concerning the 2014 Multifamily Housing Revenue Bond Rules, without changes to the proposed text as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7490) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to enact new sections and improve the Private Activity Bond Program and achieve consistency with other multifamily programs.

The Department accepted public comments between September 19, 2014, and October 20, 2014. Comments regarding the

repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on December 18, 2014.

STATUTORY AUTHORITY. The repealed sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2015
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-3929

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10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 12, §§12.1 - 12.10, concerning Multifamily Housing Revenue Bond Rules. Section 12.1 and §12.5 are adopted with changes to the proposed text as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7490). Sections 12.2 - 12.4 and §§12.6 - 12.10 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the rules will result in improvement to the Private Activity Bond Program and achieve consistency with other multifamily programs.

The Department accepted public comment between September 19, 2014, and October 20, 2014. Comments regarding the proposed new sections were accepted in writing and by fax. No comments were received concerning the proposed new sections.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds ("Bonds") by the Texas Department of Housing and Community Affairs ("Department"). The Department is authorized to issue such Bonds pursuant to Texas Government Code, Chapter 2306. Notwithstanding anything in this chapter to the contrary, Bonds which are issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Texas Government Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code ("Code"), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this title (relating to the Housing Tax Credit Program Qualified Allocation Plan) and Chapter 10 of this title (relating to Uniform Multifamily Rules) for the current program year. In general, the Applicant will be required to satisfy the requirements of the Qualified Allocation Plan ("QAP") and Uniform Multifamily Rules in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board. If the applicable QAP or Uniform Multifamily Rules contradict rules set forth in this chapter, the applicable QAP or Uniform Multifamily Rules will take precedence over the rules in this chapter. The Department encourages participation in the Bond program by working directly with Applicants, lenders, Bond Trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs associated with the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the process, the Applicant is solely responsible for determining whether to proceed with the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis.

(e) Waivers. Requests for waivers of program rules must be made in accordance with §10.207 of this title (relating to Waiver of Rules for Applications).

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (10) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application.

(1) Submission of the multifamily bond pre-application in the form prescribed by the Department;

(2) Completed Bond Review Board Residential Rental Attachment for the current program year;

(3) Site Control, evidenced by the documentation required under §10.204(10) of this title (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of the Board meeting at which the inducement resolution is considered and must meet the requirements of §10.204(10) of this title at the time of Application;

(4) Zoning evidenced by the documentation required under §10.204(11) of this title;

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Current market information (must support affordable rents);

(7) Local area map that shows the location of the Development Site and the location of at least six (6) community assets within a one mile radius (two miles if in a Rural Area). Only one community asset of each type will count towards the number of assets required.

The mandatory community assets and specific requirements are identified in §10.101(a)(2) of this title (relating to Site and Development Requirements and Restrictions);

(8) Organization Chart showing the structure of the Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable;

(9) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State;

(10) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §10.203 of this title (relating to Public Notifications (§2306.5705(9)). Notifications must not be older than three (3) months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10 percent or a 5 percent change in density (calculated as units per acre) as a result of a change in the size of the Development Site. In addition, should a change in elected official occur between the submission of a pre-application and the submission of an Application, Applicants are required to notify the newly elected (or appointed) official.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406218
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2015
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-3929

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS
SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §24.8

The Public Utility Commission of Texas (commission) adopts an amendment to §24.8, relating to Administrative Completeness, without changes to the proposed text as published in the October 31, 2014, issue of the *Texas Register* (39 TexReg 8491). The proposed amendment will extend the time for Staff to review an application for administrative completeness from 10 working days to 30 calendar days. This amendment is adopted under Project Number 43423.

No public hearing was held on this rulemaking. The commission did not receive any comments on the proposed amendment.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2007 and Supp. 2014) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure, and Texas Water Code §13.041 (West 2008 and Supp. 2014) which provides the Public Utility Commission the authority to regulate and supervise the business of each water and sewer utility in its jurisdiction and to adopt and enforce rules reasonably required in the exercise and jurisdiction, including rules governing practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052, and Texas Water Code §13.041.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2014.

TRD-201406181
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 7, 2015
Proposal publication date: October 31, 2014
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 77. SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

16 TAC §§77.20 - 77.23

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 77, §§77.20 - 77.23 without changes to the proposed text as published in the October 17, 2014, issue of the *Texas Register* (39 TexReg 8118). The rules will not be republished.

The adopted amendments are necessary to implement the Department's "plain language initiative", an agency-wide effort to use plain language in Department rules, forms, letters and other communication.

In the ongoing efforts to implement plain language rules, the Department identified outdated, unclear, and unnecessary words and terms in Service Contract Providers and Administrators rules, §§77.20 - 77.23, and replaced the words and terms with language that is easier to read and understand.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 17, 2014, issue of the *Texas Register* (39 TexReg 8118). The deadline for public comments was November 17, 2014. The Department received comments from

one interested party regarding the proposed rules during the 30-day public comment period.

Public Comment: The commenter recommends changing the name from "replacement" to "addition" form when an agent writes a new insurance policy on an already existing policy from another company.

Department Response: The comment referenced a form that is not provided by the department, and is therefore outside the scope of the rule amendments.

The amendments are adopted under Texas Occupations Code, Chapters 51 and 1304, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1304. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406191
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2015
Proposal publication date: October 17, 2014
For further information, please call: (512) 463-8179

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 205. CEMETERIES AND CREMATORIES

22 TAC §§205.1 - 205.3, 205.6, 205.9, 205.11

The Texas Funeral Service Commission (the Commission) adopts amendments to §§205.1 - 205.3, 205.6, 205.9, and 205.11, concerning Cemeteries and Crematories, without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7863).

Pursuant to Texas Government Code, §2001.039, the Commission reviewed this chapter and determined an update to these rules was necessary to reflect the current requirements as determined by Texas Occupations Code Chapter 651 and Texas Health and Safety Code Chapter 716. The Commission intends the amended rules to improve ease of use for both consumers and industry and to improve efficiencies for agency staff as the rules are updated and clarified.

The Commission did not receive any public comment on the proposed amendments.

This adoption is made pursuant to Texas Occupations Code, §651.152, which authorizes the Texas Funeral Service Commission to adopt rules considered necessary for carrying out the Commission's work; Texas Government Code, §2001.039, which requires state agencies to review their rules and readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

No other statutes, articles, or codes are affected by these sections.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406216
Janice McCoy
Director
Texas Funeral Service Commission
Effective date: January 8, 2015
Proposal publication date: October 3, 2014
For further information, please call: (512) 936-2469

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CHAPTER 206. GUARANTEED STUDENT LOANS

22 TAC §206.1

The Texas Funeral Service Commission (the Commission) adopts amendments to §206.1, concerning Default and Repayment Agreements, without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7865).

Pursuant to Texas Government Code, §2001.039, the Commission reviewed this chapter and determined an update to these rules was necessary to reflect the current requirements as determined by Texas Occupations Code, Chapter 651. The Commission intends the amended rule to improve ease of use for both consumers and industry and to improve efficiencies for agency staff as the rule is updated and clarified.

The Commission did not receive any public comment on the proposed amendments.

This adoption is made pursuant to Texas Occupations Code, §651.152, which authorizes the Texas Funeral Service Commission to adopt rules considered necessary for carrying out the Commission's work; Texas Government Code, §2001.039, which requires state agencies to review their rules and readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

No other statutes, articles, or codes are affected by this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406219

Janice McCoy
Director
Texas Funeral Service Commission
Effective date: January 8, 2015
Proposal publication date: October 3, 2014
For further information, please call: (512) 936-2469

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CHAPTER 207. ALTERNATIVE DISPUTE RESOLUTION

22 TAC §207.1

The Texas Funeral Service Commission (the Commission) amends §207.1, concerning Alternative Dispute Resolution, without changes to the proposed rule text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7866).

Pursuant to Texas Government Code, §2001.039, the Commission reviewed this chapter and determined an update to this rule was necessary to reflect the current requirements as determined by Texas Occupations Code Chapter 651. The Commission intends the amended rules to improve ease of use for both consumers and industry and to improve efficiencies for agency staff as the rule is updated and clarified.

The Commission did not receive any public comment on the proposed amendments.

This adoption is made pursuant to Texas Occupations Code, §651.152, which authorizes the Texas Funeral Service Commission to adopt rules considered necessary for carrying out the Commission's work; Texas Government Code, §2001.039, which requires state agencies to review their rules and readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

No other statutes, articles, or codes are affected by this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406220
Janice McCoy
Director
Texas Funeral Service Commission
Effective date: January 8, 2015
Proposal publication date: October 3, 2014
For further information, please call: (512) 936-2469

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CHAPTER 209. ETHICAL STANDARDS FOR PERSONS LICENSED BY THE COMMISSION

22 TAC §209.1

The Texas Funeral Service Commission (the Commission) adopts amendments to §209.1, concerning Ethical Standards, without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7868).

Pursuant to Texas Government Code, §2001.039, the Commission reviewed this chapter and determined an update to this rule was necessary to reflect the current requirements as determined by Texas Occupations Code, Chapter 651. The Commission intends the amended rule to improve ease of use for both consumers and industry and to improve efficiencies for agency staff as the rule is updated and clarified.

The Commission did not receive any public comment on the proposed amendments.

This adoption is made pursuant to Texas Occupations Code, §651.152, which authorizes the Texas Funeral Service Commission to adopt rules considered necessary for carrying out the Commission's work; Texas Government Code, §2001.039, which requires state agencies to review their rules and readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

No other statutes, articles, or codes are affected by this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2014.

TRD-201406223
Janice McCoy
Director
Texas Funeral Service Commission
Effective date: January 8, 2015
Proposal publication date: October 3, 2014
For further information, please call: (512) 936-2469

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER C. ASSESSMENT OF MAINTENANCE TAXES AND FEES

28 TAC §1.414

The Texas Department of Insurance adopts amendments to 28 Texas Administrative Code §1.414, concerning the 2015 assessment of maintenance taxes and fees imposed by the Texas Insurance Code. The amendments are adopted without changes to the proposed text published in the November 14, 2014, issue of the *Texas Register* (39 TexReg 8901), and will not be republished.

Under Government Code §2001.033(a)(1), the department's reasoned justification for these amendments is set out in this order, which includes the preamble and rules.

REASONED JUSTIFICATION. The amendments are necessary to adjust the rates of assessment for maintenance taxes and fees for 2015 on the basis of gross premium receipts for calendar year 2014 using the methodology described below.

Section 1.414 includes rates of assessment for maintenance taxes and fees for 2015 to be applied to life, accident, and health insurance; motor vehicle insurance; casualty insurance and fidelity, guaranty, and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; workers' compensation self-insured groups; title insurance; health maintenance organizations (HMOs); third party administrators; nonprofit legal services corporations issuing prepaid legal services contracts; and workers' compensation certified self-insurers.

In general, the department's 2015 revenue need (the amount that must be funded by maintenance taxes or fees, examination overhead assessments, the department's self-directed budget account as established under Insurance Code §401.252, and premium finance examination assessments) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2014.

To determine total cost need, the department combined costs from: (i) appropriations set out in Chapter 1411 (SB 1), Acts of the 83rd Legislature, Regular Session, 2013 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by Insurance Code Chapter 401, Subchapters D and F, as approved by the commissioner of insurance for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses and administrative support costs; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2015 fiscal year until the next assessment collection period in 2016. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation (DWC) and the workers' compensation research and evaluation group.

The department determined how to allocate the remaining cost need attributed to each funding source using the following method:

For each section within the department that provides services directly to the public or the insurance industry, the department allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the self-directed budget account, the examination assessment, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated the percentage for each funding source by dividing the total directly allocated to each funding source by the total direct cost. The department used this percentage to allocate administrative support costs to each funding source. Administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total direct costs and administrative support costs for each funding source.

The General Appropriations Act includes appropriations to state agencies other than the department that must be funded by Account No. 0036 and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees. The department adds these costs to the sum of the direct costs and the administrative support costs for the appropriate funding source, when possible. For instance, the department allocates an appropriation to the Texas Department of Transportation for the crash information records system to the motor vehicle maintenance tax. The department includes costs for other agencies that cannot be directly allocated to a funding source to the administrative support costs. For instance, the department includes an appropriation to the Texas Facilities Commission for building support costs in administrative support costs.

The department calculates the total revenue need after completing the allocation of costs to each funding source. To complete the calculation of revenue need, the department removes costs, revenues received, and the fund balance related to the self-directed budget account. Based on remaining balances, the department reduces the total cost need by subtracting the estimated ending fund balance for fiscal year 2014 (August 31, 2014) and estimated fee revenue collections for fiscal year 2015. The resulting balance is the estimated revenue need that must be supported during the 2015 fiscal year by the following funding sources: the maintenance taxes or fees, exam overhead assessments, and premium finance exam assessments.

The department determines the revenue need for each maintenance tax or fee line by dividing the total cost need for each maintenance tax line by the total of the revenue needs for all maintenance taxes. The department multiplies the calculated percentage for each line by the total revenue need for maintenance taxes. The resulting amount is the revenue need for each maintenance tax line. The department adjusts the revenue need by subtracting the estimated amount of fee and reimbursement revenue collected for each maintenance tax or fee line from the total of the revenue need for each maintenance tax or fee line. The department further adjusts the resulting revenue need as described in the following paragraphs.

The cost allocated to the life, accident, and health maintenance tax exceeds the amount of revenue that can be collected at the maximum rate set by statute. The department allocates the difference between the amount estimated to be collected at the maximum rate and the costs allocated to the life, accident, and health maintenance tax to the other maintenance tax or fee lines. The department allocates the life, accident, and health shortfall based on each of the remaining maintenance tax or fee lines' proportionate share of the total costs for maintenance taxes or fees. The department uses the adjusted revenue need as the basis for calculating the maintenance tax rates.

For each line of insurance, the department divides the adjusted revenue need by the estimated premium volume or assessment base to determine the rate of assessment for each maintenance tax or fee.

The following paragraphs provide an explanation of the methodology to develop the proposed rates for DWC and the Office of Injured Employee Counsel (OIEC).

To determine the revenue need, the department considered these factors applicable to costs for DWC and OIEC: (i) the appropriations in the General Appropriations Act for fiscal year 2015 from Account No. 0036; (ii) estimated other costs statutorily required to be paid from Account No. 0036, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance Account No. 0036 costs from the end of

the 2015 fiscal year until the next assessment collection period in 2016. The department adds these three factors to determine the total revenue need.

The department reduces the total revenue need by subtracting the estimated fund balance at August 31, 2014, and the DWC fee and reimbursement revenue estimated to be collected and deposited to Account No. 0036 in fiscal year 2015. The resulting balance is the estimated revenue need from maintenance taxes. The department calculated the maintenance tax rate by dividing the estimated revenue need by the combined estimated workers' compensation premium volume and the certified self-insurers' liabilities plus the amount of expense incurred for administration of self-insurance.

The following paragraphs explain the methodology the department used to develop the proposed rates for the workers' compensation research and evaluation group.

To determine the revenue need, the department considered the following factors applicable to the workers' compensation and research and evaluation group: (i) the appropriations in the General Appropriations Act for fiscal year 2015 from Account No. 0036 and from General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) estimated other costs statutorily required to be paid from this funding source, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance costs from this funding source from the end of the 2015 fiscal year until the next assessment collection period in 2016. The department adds these three amounts to determine the total revenue need.

The department reduced the total revenue need by subtracting the estimated fund balance at August 31, 2014. The resulting balance is the estimated revenue need from maintenance taxes. The department calculated the maintenance tax rate by dividing the estimated revenue need by the estimated assessment base.

Insurance Code §964.068 (created by SB 734, 83rd Legislature, Regular Session, 2013) provides that a captive insurance company is subject to maintenance tax under Subtitle C, Title 3, on the correctly reported gross premiums from writing insurance on risks located in Texas as applicable to the individual lines of business written. The rates adopted in this rule will be applied to captive insurance companies based on the individual lines of business written, unless the commissioner postpones or waives the tax for a period not to exceed two years for any foreign or alien captive insurance company redomesticating to Texas under Insurance Code §964.071(c).

The following paragraphs provide a brief summary and analysis of the reasons for the adopted amendments.

The amendment to the section heading reflects the year for which the proposed assessment of maintenance taxes and fees is applicable. The amendments in subsections (a) - (f), and (h) reflect the appropriate year for accurate application of the section.

Amendments in subsections (a)(1) - (9), (c)(1) - (3), (d), (e), and (f) update rates to reflect the methodology the department developed for 2015.

The amendment in section (h) deletes the Comptroller of Public Accounts' address to reduce changes to the subsection each time the address is updated.

Amendments in subsections (a)(2), (c)(3), and (e) are nonsubstantive and are made to conform with the department's writing style guides. Subsection (a)(2) deletes the comma between "casualty insurance and fidelity" to be consistent with the Insurance Code; subsection (c)(3) adds an "s" to services to be consistent with the Insurance Code; and subsection (e) deletes the first occurrence of the word "percent" as unnecessary.

Subsection (a) establishes the 2014 calendar year rates for maintenance taxes and fees on gross premiums of insurers for the lines of insurance specified in paragraphs (1) - (9) of the subsection. Subsection (a)(1) sets the rate for motor vehicle insurance at .060 of 1.0 percent under Insurance Code §254.002. Subsection (a)(2) sets the rate for casualty insurance and fidelity, guaranty, and surety bonds at .080 of 1.0 percent under Insurance Code §253.002. Subsection (a)(3) sets the rate for fire insurance and allied lines, including inland marine, at .340 of 1.0 percent under Insurance Code §252.002.

Paragraphs (4) - (8) of subsection (a) set rates for workers' compensation insurance; subsection (a)(4) sets a rate for workers' compensation insurance at .066 of 1.0 percent under Insurance Code §255.002. Subsection (a)(5) sets a rate for workers' compensation insurance at 1.533 percent under Labor Code §403.003. Subsection (a)(6) sets a rate for workers' compensation insurance at .016 of 1.0 percent under Labor Code §405.003. Subsection (a)(7) sets a rate for workers' compensation insurance at 1.533 percent under Labor Code §407A.301. Subsection (a)(8) sets a rate for workers' compensation insurance at .066 of 1.0 percent under Labor Code §407A.302. Subsection (a)(9) sets the rate for title insurance at .076 of 1.0 percent under Insurance Code §271.004.

Subsection (b) establishes the rates for maintenance taxes and fees for calendar year 2014 for life, health, and accident insurance and the gross considerations for annuity and endowment contracts, setting them at .040 of 1.0 percent under Insurance Code §257.002.

Subsection (c) establishes the rates for maintenance taxes for calendar year 2014 for entities specified in paragraphs (1) - (3) of the subsection. Subsection (c)(1) sets the rate for single-service HMOs at $.28 per enrollee, for multiservice HMOs at $.84 per enrollee, and for limited service HMOs at $.28 per enrollee, under Insurance Code §258.003. Subsection (c)(2) sets the rate for third party administrators at .010 of 1.0 percent of the correctly reported gross amount of administrative or service fees under Insurance Code §259.003. Subsection (c)(3) sets the rate for nonprofit legal services corporations at .020 of 1.0 percent of the correctly reported gross revenues under Insurance Code §260.002.

Subsection (d) establishes the rates for maintenance taxes for certified self-insurers to support the workers' compensation research and evaluation group in calendar year 2015. Subsection (d) sets a rate of .016 of 1.0 percent of the tax base calculated under Labor Code §405.003, and Labor Code §407.104(b) specifies that the maintenance tax must be billed to the certified self-insurer by DWC.

Subsection (e) establishes the rates for maintenance taxes for workers' compensation self-insurance groups under Labor Code §405.003 and §407A.301 to support the workers' compensation research and evaluation group in calendar year 2015. Subsection (e) sets a rate of .016 percent of 1.0 percent of the tax base calculated under Labor Code §407.103(b).

Subsection (f) establishes a self-insurer maintenance tax for certified self-insurers under Labor Code §407.103 and §407.104. The rate set by subsection (f) is 1.533 percent of the tax base

calculated under Labor Code §407.103(b), and subsection Labor Code §407.104(b) provides that it must be billed to the certified self-insurer by DWC.

Subsection (g) notes that the enactment of SB 14, 78th Legislature, Regular Session, 2003, relating to certain insurance rates, forms, and practices did not affect the calculation of the maintenance tax rates or the assessment of the taxes.

Subsection (h) provides for the taxes assessed under §1.414(a) - (c), and (e) to be payable and due to the Comptroller of Public Accounts on March 1, 2015.

SUMMARY OF COMMENTS. The department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under Insurance Code §§201.001(a)(1), (b), and (c); 201.052(a), (d), and (e); 251.001; 252.001 - 252.003; 253.001 - 253.003; 254.001 - 254.003; 255.001 - 255.003; 257.001 - 257.003; 258.002 - 258.004; 259.002 - 259.004; 260.001 - 260.003; 271.002 - 271.006; and 36.001; and Labor Code §§403.002, 403.003, 403.005, 405.003(a) - (c), 407.103, 407.104(b), 407A.301, and 407A.302.

Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner shall administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

Insurance Code §201.052(a) requires the department to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(d) provides that in setting maintenance taxes for each fiscal year, the commissioner shall ensure that the amount of taxes imposed is sufficient to fully reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(e) provides that if the amount of maintenance taxes collected is not sufficient to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller, other money in the Texas Department of Insurance operating account shall be used to reimburse the appropriate portion of the general revenue fund.

Insurance Code §251.001 directs the commissioner to annually determine the rate of assessment of each maintenance tax imposed under Insurance Code Title 3, Subtitle C.

Insurance Code §252.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §252.003. Insurance Code §252.001 also specifies that the tax required by Insurance Code Chapter 252 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 252.

The Insurance Code §252.002 provides that the rate of assessment set by the commissioner may not exceed 1.25 percent of the gross premiums subject to taxation under Insurance Code §252.003. Section 252.002(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating all classes of insurance specified under Insurance Code Chapters 1807, 2001-2006, 2171, 6001, 6002, and 6003; Chapter 5, Subchapter C; Chapter 544, Subchapter H; Chapter 1806, Subchapter D; and §403.002; Government Code §§417.007, 417.008, and 417.009; and the Occupations Code Chapter 2154.

Insurance Code §252.003 specifies that an insurer shall pay maintenance taxes under Insurance Code Chapter 252 on the correctly reported gross premiums from writing insurance in Texas against loss or damage by bombardment; civil war or commotion; cyclone; earthquake; excess or deficiency of moisture; explosion as defined by Insurance Code §2002.006(b); fire; flood; frost and freeze; hail, including loss by hail on farm crops; insurrection; invasion; lightning; military or usurped power; an order of a civil authority made to prevent the spread of a conflagration, epidemic, or catastrophe; rain; riot; the rising of the waters of the ocean or its tributaries; smoke or smudge; strike or lockout; tornado; vandalism or malicious mischief; volcanic eruption; water or other fluid or substance resulting from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires, water pipes, or other conduits or containers; weather or climatic conditions; windstorm; an event covered under a home warranty insurance policy; or an event covered under an inland marine insurance policy.

Insurance Code §253.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §253.003. Section 253.001 also provides that the tax required by Insurance Code Chapter 253 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 253.

Insurance Code §253.002 provides that the rate of assessment set by the commissioner may not exceed 0.4 percent of the gross premiums subject to taxation under Insurance Code §253.003. Section 253.002(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating all classes of insurance specified under Insurance Code §253.003.

Insurance Code §253.003 specifies that an insurer shall pay maintenance taxes under Insurance Code Chapter 253 on the correctly reported gross premiums from writing a class of insurance specified under Insurance Code Chapters 2008, 2251, and 2252; Chapter 5, Subchapter B; Chapter 1806, Subchapter C; Chapter 2301, Subchapter A; and Title 10, Subtitle B.

Insurance Code §254.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §254.003. Section 254.001 also provides that the tax required by Insurance Code Chapter 254 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 254.

Insurance Code §254.002 provides that the rate of assessment set by the commissioner may not exceed 0.2 percent of the gross premiums subject to taxation under Insurance Code §254.003.

Section 254.002 also provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating motor vehicle insurance. Section 254.003 specifies that an insurer shall pay maintenance taxes under Insurance Code Chapter 254 on the correctly reported gross premiums from writing motor vehicle insurance in Texas, including personal and commercial automobile insurance.

Insurance Code §255.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §255.003, including a stock insurance company, mutual insurance company, reciprocal or interinsurance exchange, and Lloyd's plan. Section 255.001 also provides that the tax required by Insurance Code Chapter 255 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 255.

Insurance Code §255.002 provides that the rate of assessment set by the commissioner may not exceed 0.6 percent of the gross premiums subject to taxation under Insurance Code §255.003. Section 255.002(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating workers' compensation insurance.

Insurance Code §255.003 specifies that an insurer shall pay maintenance taxes under Insurance Code Chapter 254 on the correctly reported gross premiums from writing workers' compensation insurance in Texas, including the modified annual premium of a policyholder that purchases an optional deductible plan under Insurance Code Chapter 2053, Subchapter E. The section also provides that the rate of assessment shall be applied to the modified annual premium before application of a deductible premium credit.

Insurance Code §257.001(a) imposes a maintenance tax on each authorized insurer, including a group hospital service corporation, managed care organization, local mutual aid association, statewide mutual assessment company, stipulated premium company, and stock or mutual insurance company, that collects from residents of this state gross premiums or gross considerations subject to taxation under Insurance Code §257.003. Section 257.001(a) also provides that the tax required by Chapter 257 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 257.

Insurance Code §257.002 provides that the rate of assessment set by the commissioner may not exceed 0.04 percent of the gross premiums subject to taxation under Insurance Code §257.003. Section 257.002(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating life, health, and accident insurers. Section 257.003 specifies that an insurer shall pay maintenance taxes under Insurance Code Chapter 257 on the correctly reported gross premiums collected from writing life, health, and accident insurance in Texas, as well as gross considerations collected from writing annuity or endowment contracts in Texas. The section also provides that gross premiums on which an assessment is based under Insurance Code Chapter 257 may not include premiums received from the United States for insurance contracted for by the United States in accordance with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. §§1395c et seq.) and its subsequent amendments; or premiums paid on group health, accident, and life policies in which the group covered by the policy consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county, or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

Insurance Code §258.002 imposes a per capita maintenance tax on each authorized HMO with gross revenues subject to taxation under Insurance Code §258.004. Section 258.002 also provides that the tax required by Insurance Code Chapter 258 is in addition to other taxes that are not in conflict with Insurance Code Chapter 258.

Insurance Code §258.003 provides that the rate of assessment set by the commissioner on HMOs may not exceed $2 per enrollee. Section 258.003 also provides that the commissioner shall annually adjust the rate of assessment of the per capita maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating HMOs. Section 258.003 also provides that the rate of assessment may differ between basic health care plans, limited health care service plans, and single health care service plans and must equitably reflect any differences in regulatory resources attributable to each type of plan.

Insurance Code §258.004 provides that an HMO shall pay per capita maintenance taxes under Insurance Code Chapter 258 on the correctly reported gross revenues collected from issuing health maintenance certificates or contracts in Texas. Section 258.004 also provides that the amount of maintenance tax assessed may not be computed based on enrollees who, as individual certificate holders or their dependents, are covered by a master group policy paid for by revenues received from the United States for insurance contracted for by the United States in accordance with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. §§1395c et seq.) and its subsequent amendments; revenues paid on group health, accident, and life certificates or contracts in which the group covered by the certificate or contract consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county, or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

Insurance Code §259.002 imposes a maintenance tax on each authorized third party administrator with administrative or service fees subject to taxation under Insurance Code §259.004. Section 259.002 also provides that the tax required by Insurance Code Chapter 259 is in addition to other taxes imposed that are not in conflict with the chapter. Section 259.003 provides that the rate of assessment set by the commissioner may not exceed 1.0 percent of the administrative or service fees subject to taxation under Insurance Code §259.004. Section 259.003(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, pro-

duces the amount the commissioner determines is necessary to pay the expenses of regulating third party administrators.

Insurance Code §260.001 imposes a maintenance tax on each nonprofit legal services corporation subject to Insurance Code Chapter 961 with gross revenues subject to taxation under Insurance Code §260.003. Section 260.001 also provides that the tax required by Insurance Code Chapter 260 is in addition to other taxes imposed that are not in conflict with the chapter. Section 260.002 provides that the rate of assessment set by the commissioner may not exceed 1.0 percent of the corporation's gross revenues subject to taxation under Insurance Code §260.003. Section 260.002 also provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating nonprofit legal services corporations. Section 260.003 provides that a nonprofit legal services corporation shall pay maintenance taxes under this chapter on the correctly reported gross revenues received from issuing prepaid legal services contracts in this state.

Insurance Code §271.002 imposes a maintenance fee on all premiums subject to assessment under Insurance Code §271.006. Section 271.002 also specifies that the maintenance fee is not a tax and shall be reported and paid separately from premium and retaliatory taxes. Section 271.003 specifies that the maintenance fee is included in the division of premiums and may not be separately charged to a title insurance agent. Section 271.004 provides that the commissioner shall annually determine the rate of assessment of the title insurance maintenance fee. Section 271.004 also provides that in determining the rate of assessment, the commissioner shall consider the requirement to reimburse the appropriate portion of the general revenue fund under Insurance Code §201.052. Section 271.005 provides that rate of assessment set by the commissioner may not exceed 1.0 percent of the gross premiums subject to assessment under Insurance Code §271.006. Section 271.005 also provides that the commissioner shall annually adjust the rate of assessment of the maintenance fee so that the fee imposed that year, together with any unexpended funds produced by the fee, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating title insurance. Section 271.006 requires an insurer to pay maintenance fees under this chapter on the correctly reported gross premiums from writing title insurance in Texas.

Labor Code §403.002 imposes an annual maintenance tax on each insurance carrier to pay the costs of administering the Texas Workers' Compensation Act and to support the prosecution of workers' compensation insurance fraud in Texas. Labor Code §403.002 also provides that the assessment may not exceed an amount equal to 2.0 percent of the correctly reported gross workers' compensation insurance premiums, including the modified annual premium of a policyholder that purchases an optional deductible plan under Insurance Code Article 5.55C. Labor Code §403.002 also provides that the rate of assessment be applied to the modified annual premium before application of a deductible premium credit. Additionally, Labor Code §403.002 states that a workers' compensation insurance company is taxed at the rate established under Labor Code §403.003, and that the tax shall be collected in the manner provided for collection of other taxes on gross premiums from a workers' compensation insurance company as provided in Insurance Code Chapter 255. Labor Code §403.002 states that each certified self-insurer shall pay a fee and maintenance taxes as provided by Labor Code Chapter 407, Subchapter F.

Labor Code §403.003 requires the commissioner to set and certify to the comptroller the rate of maintenance tax assessment, taking into account: (i) any expenditure projected as necessary for DWC and OIEC to administer the Texas Workers' Compensation Act during the fiscal year for which the rate of assessment is set and reimburse the general revenue fund as provided by Insurance Code §201.052; (ii) projected employee benefits paid from general revenues; (iii) a surplus or deficit produced by the tax in the preceding year; (iv) revenue recovered from other sources, including reappropriated receipts, grants, payments, fees, gifts, and penalties recovered under the Texas Workers' Compensation Act; and (v) expenditures projected as necessary to support the prosecution of workers' compensation insurance fraud. Labor Code §403.003 also provides that in setting the rate of assessment, the commissioner may not consider revenue or expenditures related to the State Office of Risk Management, the workers' compensation research functions of the department under Labor Code Chapter 405, or any other revenue or expenditure excluded from consideration by law.

Labor Code §403.005 provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax imposed under §403.003 so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses of administering the Texas Workers' Compensation Act. Labor Code §405.003(a) - (c) establishes a maintenance tax on insurance carriers and self-insurance groups to fund the workers' compensation research and evaluation group, it provides for the department to set the rate of the maintenance tax based on the expenditures authorized and the receipts anticipated in legislative appropriations, and it provides that the tax is in addition to all other taxes imposed on insurance carriers for workers' compensation purposes.

Labor Code §407.103 imposes a maintenance tax on each workers' compensation certified self-insurer for the administration of the DWC and OIEC and to support the prosecution of workers' compensation insurance fraud in Texas. Labor Code §407.103 also provides that not more than 2.0 percent of the total tax base of all certified self-insurers, as computed under subsection (b) of the section, may be assessed for the maintenance tax established under Labor Code §407.103. Labor Code §407.103 also provides that to determine the tax base of a certified self-insurer for purposes of Labor Code Chapter 407, the department shall multiply the amount of the certified self-insurer's liabilities for workers' compensation claims incurred in the previous year, including claims incurred but not reported, plus the amount of expense incurred by the certified self-insurer in the previous year for administration of self-insurance, including legal costs, by 1.02. Labor Code §407.103 also provides that the tax liability of a certified self-insurer under the section is the tax base computed under subsection (b) of the section multiplied by the rate assessed workers' compensation insurance companies under Labor Code §403.002 and §403.003. Finally, Labor Code §407.103 provides that in setting the rate of maintenance tax assessment for insurance companies, the commissioner may not consider revenue or expenditures related to the operation of the self-insurer program under Labor Code Chapter 407.

Labor Code §407.104(b) provides that the department shall compute the fee and taxes of a certified self-insurer and notify the certified self-insurer of the amounts due. Labor Code §407.104(b)

also provides that a certified self-insurer shall remit the taxes and fees to DWC.

Labor Code §407A.301 imposes a self-insurance group maintenance tax on each workers' compensation self-insurance group based on gross premium for the group's retention. Labor Code §407A.301 provides that the self-insurance group maintenance tax is to pay for the administration of DWC, the prosecution of workers' compensation insurance fraud in Texas, the research functions of the department under Labor Code Chapter 405, and the administration of OIEC under Labor Code Chapter 404. Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(1) and (2) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under Labor Code §403.002 and §403.003. Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(3) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under Labor Code §405.003. Additionally, Labor Code §407A.301 provides that the tax under the section does not apply to premium collected by the group for excess insurance. Finally, Labor Code §407A.301(e) provides that the tax under the section shall be collected by the comptroller as provided by Insurance Code Chapter 255 and Insurance Code §201.051.

Labor Code §407A.302 requires each workers' compensation self-insurance group to pay the maintenance tax imposed under Insurance Code Chapter 255, for the administrative costs incurred by the department in implementing Labor Code Chapter 407A. Labor Code §407A.302 provides that the tax liability of a workers' compensation self-insurance group under the section is based on gross premium for the group's retention and does not include premium collected by the group for excess insurance. Labor Code §407A.302 also provides that the maintenance tax assessed under the section is subject to Insurance Code Chapter 255, and that it shall be collected by the comptroller in the manner provided by Insurance Code Chapter 255.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 17, 2014.

TRD-201406155
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: January 6, 2015
Proposal publication date: November 14, 2014
For further information, please call: (512) 463-6327

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CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES

28 TAC §5.4200, §5.4202

INTRODUCTION. The Texas Department of Insurance adopts amendments to 28 TAC §5.4200, Definitions, and new §5.4202, Good Cause Extensions under Insurance Code §2210.205. The new rules define "good cause" and explain how an insured asks the commissioner to extend the one-year claim-filing deadline for Texas Windstorm Insurance Association (TWIA) policyholders. The rules are adopted without change to the proposal published in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5079) and will not be republished.

REASONED JUSTIFICATION. The rules implement HB 3, 82nd Legislature, First Called Session, 2011, which added Insurance Code §2210.205 and §2210.573 to establish a one-year claim-filing deadline for TWIA policyholders. Insurance Code §2210.205(b) authorizes the commissioner to extend the claim-filing deadline for up to 180 days on a showing of good cause.

The rules amend §5.4200, Definitions, by adding new §5.4200(5), which refers to new §5.4202(a) for the definition of "good cause" and limits applicability of the definition to extensions under Insurance Code §2210.205(b). To make the deadline extension process easier to understand, the actual definition is included with the extension request filing procedures in §5.4202(a). The rule is renumbered to reflect the addition of new §5.4200(5).

New §5.4202(a), Good Cause Extensions under Insurance Code §2210.205, defines "good cause" as those objective facts beyond the insured's control that reasonably caused the insured to fail to file a claim under the policy within the one-year claim-filing deadline. The definition is the standard the commissioner will use to determine whether an insured's claim-filing deadline should be extended.

New §5.4202(b) clarifies that any extension of a claim-filing deadline is effective on the date an insured's one-year filing period expires, whether the commissioner grants the extension before or after the expiration date. Under Insurance Code §2210.205(b), §5.4202(b) limits an extension to no more than 180 days. An extension is a discretionary act by the commissioner, and may be for any period of time up to 180 days. Section 5.4202(b) also limits extensions to the claims for which they were granted.

New §5.4202(c) details the procedures for an insured to request an extension.

SUMMARY OF COMMENTS AND RESPONSES. TDI accepted written comments from July 4, 2014, through September 3, 2014. During the comment period, TDI received two written comments. TDI held a public hearing on September 3, 2014, but received no additional comments at the hearing. This order summarizes all of the comments TDI received on the proposed rules.

General Comments

Comment on applicability of "good cause" standard: A commenter notes that "good cause" is used multiple times in Insurance Code Chapter 2210 and TWIA policies, and questions why the rule standard applies only to claim-filing extension requests. The commenter expresses concern that limiting the standard to claim-filing extension requests will further frustrate an already complicated and unique claim process, and suggests applying

the good cause standard to all instances where the Code and TWIA policies use the term.

Agency Response: TDI did not amend the rule as suggested because the rule proposal was limited to requests for claim-filing extensions under Insurance Code §2210.205. Applying the "good cause" standard as recommended in the comment would significantly exceed the proposal's scope. TDI will consider developing "good cause" standards for other rules in future proposals.

Comment on applicability of "good cause" standard: Another commenter expresses concern that if the causal chain is elongated enough at TWIA's behest, it is hard to imagine many circumstances that are not technically within an insured's control. The commenter presents hypothetical examples, such as the choice of a profession, or someone falling into a diabetic coma after a stroke, as instances where TWIA might argue that the objective facts underlying a claim-filing extension request were within the control of the particular insured. The commenter does not propose alternative language.

Agency Response: TDI did not make any changes based on the comment. TDI disagrees that the good cause standard is overly inclusive of matters within an insured's control. The change the commenter requests is not clear. No alternative wording was suggested. TDI's good cause standard is similar to that used in benefit review conferences. 28 TAC §141.2 (b)(1)(A) and §141.3(b)(1).

Comment on additional disclosures: A commenter states the proposed rules do not explain how policyholders will be made aware of the new rules and procedures, and recommends amending the rule to require TWIA to provide a disclosure form explaining the new definition and procedures with all new and renewal policies. The commenter states this would be the best way to inform policyholders of their right to request a claim-filing deadline extension.

Agency Response: TDI declines to make the recommended changes. TWIA policies already include a one-year claim-filing deadline, required by Insurance Code §2210.205(a)(1). Policyholders whose claims are denied because they missed the deadline are notified by TWIA that they may ask the commissioner to extend the deadline. Rather than add to the volume of information distributed to all policyholders, an affected policyholder is informed how to request an extension when the claim is denied, when the need for this information is most important. TDI understands the importance of informing affected policyholders about the new rules and procedures, and will work with TWIA to provide these policyholders with copies of the rules and an explanation of how to request deadline extensions. TDI's Coastal Outreach and Assistance Services Team also works with communities to make policyholders aware of the importance of timely filing claims after a storm has occurred.

Comment on §5.4202(c)(1): A commenter expresses concern that policyholders may not be familiar with the Texas Administrative Code and may be confused by the rules as written. The commenter recommends repeating the §5.4251 filing requirements in §5.4202, and amending TWIA policies and rules to specify where requests must be sent, the acceptable methods for submitting requests, who must receive the requests, the date requests are considered received by TDI, and a statement about who is a "party."

Agency Response: TDI declines to require TWIA to incorporate the notice and filing requirements of §5.4251 into TWIA policies or new §5.4202. The suggested amendments to TWIA policies and rules would not change the requirement of §5.4251 that requests and submissions be sent to TDI. New §5.4202(c)(1) provides that a "request for an extension under this section must be sent in writing to TDI, under §5.4251 of this title." Section 5.4251 explains how and where to send an item to TDI, and when the item is considered received. "Party" is defined in new §5.4200(9) as "the association or claimant," and includes "employees and other representatives of a party." New §5.4202(c)(1) does not change §5.4251. Restating §5.4251 in the new rule would unnecessarily lengthen it and create confusion about how to request an extension.

Comment on §5.4202(c)(2). A commenter states the requirement of §5.4202(c)(2) that an insured describe the "good cause" that caused the insured to miss the claim-filing deadline does not clearly explain the standard for supporting a good cause extension. The commenter suggests amending §5.4202(c)(2) to state "(2) describe the good cause and include the objective facts along with any supporting documentation that caused the insured to miss the one-year claim-filing deadline."

Agency Response: TDI declines to require policyholders to submit supporting documentation with extension requests. In determining whether to grant extension requests, TDI accepts the assertions in each request as true. The review process is not an evidentiary hearing. Documents may be included with the request, but are not required.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Office of Public Insurance Counsel (with suggested changes); Texas Watch (with suggested changes)

Against: No Comments

STATUTORY AUTHORITY. TDI adopts the new and amended sections under Insurance Code §§2210.008, 2210.205, and 36.001. Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A. Insurance Code §2210.205 authorizes the commissioner to grant an extension to the one-year claim-filing deadline if the policyholder shows good cause. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of the state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 16, 2014.

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Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: January 5, 2015
Proposal publication date: July 4, 2014
For further information, please call: (512) 463-6327

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER J. EXAMINATION EXPENSES AND ASSESSMENTS

28 TAC §7.1001

The Texas Department of Insurance adopts amendments to 28 Texas Administrative Code §7.1001, concerning assessments to cover the expenses of examining domestic and foreign insurance companies and self-insurance groups providing workers' compensation insurance. The amendments are adopted without changes to the proposed text published in the November 14, 2014, issue of the *Texas Register* (39 TexReg 8908).

Under Government Code §2001.033(a)(1), the department's reasoned justification for these amendments is set out in this order, which includes the preamble and rules.

REASONED JUSTIFICATION. The amendments are necessary to establish the examination expenses to be levied against and collected from each domestic and foreign insurance company and each self-insurance group providing workers' compensation insurance examined during the 2015 calendar year. The amendments are also necessary to establish the rates of assessment to be levied against and collected from each domestic insurance company examined during the 2015 calendar year, based on admitted assets and gross premium receipts for the 2014 calendar year, and from each foreign insurance company examined during the 2015 calendar year, based on a percentage of the gross salary paid to an examiner for each month or part of a month during which the examination is made.

The amendments are based on requirements in Insurance Code §§201.001(a)(1), (b), and (c); 401.151; 401.152; 401.155; 401.156; 843.156(h); and 36.001; and Labor Code §407A.252(b).

The following paragraphs explain the methodology used to determine examination overhead assessments for 2015.

In general, the department's 2015 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; premium finance exam assessments; and funds in the self-directed budget account, as established under Insurance Code §401.252) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2014.

To determine total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1411 (SB 1), Acts of the 83rd Legislature, Regular Session, 2013 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by Insurance Code Subchapters D and F of Chapter 401 as approved by the commissioner of insurance for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses and administrative support costs; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2015 fiscal year until the next assessment collection period in 2016. This estimate includes an amount to contribute to funding the examination premium tax credits reimbursement that will occur in 2015. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the revenue need attributed to each funding source using the following method:

Each section within the department that provides services directly to the public or the insurance industry allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the examination assessment, the self-directed budget account as limited by Insurance Code §401.252, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated a percentage for each funding source by dividing the total directly allocated to each funding source by the total of the direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total of direct costs and administrative support costs for each funding source.

To complete the calculation of the revenue need, the department combined the costs allocated to the examination overhead assessment source and the self-directed budget account source. The department then subtracted the fiscal year 2015 estimated amount of examination direct billing revenue from the amount of the combined costs of the examination overhead assessment source and the self-directed budget account source. The resulting balance is the amount of the examination revenue needed to calculate the examination overhead assessment rates.

To calculate the assessment rates, the department allocated 50 percent of the revenue need to admitted assets and 50 percent to gross premium receipts. The department divided the revenue need for gross premium receipts by the total estimated gross premium receipts for calendar year 2014 to determine the proposed rate of assessment for gross premium receipts. The department divided the revenue need for admitted assets by the total estimated admitted assets for calendar year 2014 to determine the proposed rate of assessment for admitted assets.

The department did not alter the methodology to include changes provided for in HB 2163, 83rd Legislature, Regular Session, 2013. That bill amends Insurance Code §401.152 allowing the department to impose an annual assessment on insurers not organized under the laws of this state in the same manner as domestic companies are assessed under Insurance Code §401.151(c). The intent of the bill, as found in the Senate Research Center's bill analysis, was to level the playing field with other states through reducing costs to Texas domestic insurers by spreading the cost of examination overhead assessments imposed by the department to all insurers licensed in Texas. The department intends to defer implementation for the 2015 assessment, because of unintended consequences, which may increase the cost to the same insurers that the bill was designed to reduce.

In the 2015 rule amendments, the department will implement the provisions of Chapter 1411 (SB 1, Acts of the 83rd Legislature, Regular Session, 2013, the General Appropriations Act), Article I, Rider 16, Page 28. This rider directs the department to reimburse the General Revenue Fund from the Texas Department of Insurance Operating Fund Account for the costs of insurance premium tax credits for examination fees and overhead assessments. The amount is estimated to be $12.7 million. SB 1665 and HB 2163, 83rd Legislature, Regular Session, 2013, allow the department to use dollars received from the examination overhead assessment (deposited to the self-directed budget account and subsequently transferred to the Texas Department of Insurance Operating Fund Account) to pay for the reimbursement of premium tax credits for examination costs. In this year's assessment, the department added an amount to contribute to funding the reimbursement in 2015. In calendar year 2015, the department will assess companies paying the examination overhead assessment to collect additional revenues to fund the reimbursement.

The following paragraphs provide a brief summary and analysis of the reasons for the adopted section.

The amendment to the section heading reflects the year for which the proposed assessment will be applicable. The amendments in subsections (b)(1), (c)(1), (c)(2)(A), (c)(2)(B), (c)(3), and (d) reflect the appropriate year for accurate application of the section.

The amendments in subsection (b)(2), (c)(2)(A), and (c)(2)(B) update assessments to reflect the methodology the department has developed for 2015, which is previously addressed.

The amendments in subsection (e) delete the department address and substitute "at the address provided on the invoice" to reduce changes to the subsection each time the address is updated.

Nonsubstantive changes have been made to conform with the department's writing style guides. In subsection (c)(4) the department deletes the words "a" and "total" because the language describing the $25 assessment is redundant.

Section 7.1001(a) provides that, for purposes of the section, the term "insurance company" includes a health maintenance organization (HMO) as defined in Insurance Code §843.002.

Section 7.1001(b) establishes the examination expenses and assessments applicable to an insurer not organized under the laws of Texas (foreign insurance company). Section 7.1001(b)(1) requires a foreign insurance company to reimburse the department for the salary and examination expenses of each examiner participating in an examination of the insurance company, describes how to calculate the part of an examiner's salary included in the examination fee, and provides that expenses the department assesses are those actually incurred by the examiner to the extent permitted by law. Section 7.1001(b)(2) requires a foreign insurance company to pay an additional assessment of 35 percent of the gross salary the department pays to each examiner for each month or partial month of the examination to cover the examiner's longevity pay; state contributions to retirement, social security, and the state-paid portion of insurance premiums; and vacation and sick leave accruals under Insurance Code §401.155. Section 7.1001(b)(3) provides that a foreign insurance company must pay the reimbursements and payments required by the subsection to the department as specified in each itemized bill the department provides to the foreign insurance company.

Section 7.1001(c) establishes the examination expenses and assessments applicable to a domestic insurance company. Section 7.1001(c)(1) requires a domestic insurance company to pay the actual salaries and expenses of the examiners allocable to an examination of the company, describes how to calculate the part of an examiner's salary included in the examination fee, and provides that expenses assessed must be those actually incurred by the examiner to the extent permitted by law.

Section 7.1001(c)(2) establishes the rates for the overhead assessment applicable to a domestic insurance company. Section 7.1001(c)(2)(A) provides that the overhead assessment applicable to a domestic insurance company includes .00231 of 1.0 percent of the admitted assets of the company as of December 31, 2014, taking into consideration the annual admitted assets that are not attributable to 90 percent of pension plan contracts as defined in §818(a) of the Internal Revenue Code of 1986 (26 U.S.C. §818(a)). Section 7.1001(c)(2)(B) provides that the overhead assessment applicable to a domestic insurance company includes .00928 of 1.0 percent of the gross premium receipts of the company for the year 2014, taking into consideration the annual premium receipts that are not attributable to 90 percent of pension plan contracts as defined in §818(a) of the Internal Revenue Code of 1986 (26 U.S.C. §818(a)).

Section 7.1001(c)(3) provides that, except as provided by paragraph (4), if a company was a domestic insurance company for less than a full year during calendar year 2014, the overhead assessment for the company is the overhead assessment required under paragraph (2)(A) and (B) of the subsection divided by 365 and multiplied by the number of days the company was a domestic insurance company during calendar year 2014.

Section 7.1001(c)(4) provides that if the overhead assessment required under §7.1001(c)(2)(A) and (B) or paragraph (3) produces an overhead assessment of less than $25, a domestic insurance company must pay a minimum overhead assessment of $25.

Section 7.1001(c)(5) provides that the department will base the overhead assessments on the assets and premium receipts reported in a domestic insurance company's annual statement.

Section 7.1001(c)(6) provides that for the purpose of applying paragraph (2)(B) of the subsection, the term "gross premium receipts" does not include insurance premiums for insurance contracted for by a state or federal government entity to provide welfare benefits to designated welfare recipients or contracted for in accord with or in furtherance of the Human Resources Code, Title 2, or the federal Social Security Act (42 U.S.C. §§301 et seq.)

Section 7.1001(d) establishes the examination expenses applicable to a workers' compensation self-insurance group. The subsection requires a workers' compensation self-insurance group to pay the actual salaries and expenses of the examiners allocable to an examination of the company, it describes how to calculate the part of an examiner's salary included in the examination fee, and it provides that expenses the department assesses are those actually incurred by the examiner to the extent permitted by law.

Section 7.1001(e) requires a domestic insurance company to pay the overhead assessment required under §7.1001(c) to the department not later than 30 days from the invoice date.

SUMMARY OF COMMENTS. The department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under Insurance Code §§201.001(a)(1), (b), and (c); 401.151; 401.152; 401.155; 401.156; 843.156(h); and 36.001; and Labor Code §407A.252(b).

Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner shall administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

Insurance Code §401.151 provides that a domestic insurer examined by the department or under the department's authority shall pay the expenses of the examination in an amount the commissioner certifies as just and reasonable.

Insurance Code §401.151 also provides that the department shall collect an assessment at the time of the examination to cover all expenses attributable directly to that examination, including the salaries and expenses of department employees and expenses described by Insurance Code §803.007. Section 401.151 also requires that the department impose an annual assessment on domestic insurers in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of Texas relating to the examination of insurers. Additionally, §401.151 states that in determining the amount of assessment, the department will consider the insurer's annual premium receipts or admitted assets, or both, that are not attributable to 90 percent of pension plan contracts as defined by §818(a), Internal Revenue Code of 1986; or the total amount of the insurer's insurance in force.

Insurance Code §401.152 provides that an insurer not organized under the laws of Texas shall reimburse the department for the salary and expenses of each examiner participating in an examination of the insurer and for other department expenses that are properly allocable to the department's participation in the examination. Section 401.152 also requires an insurer to pay the expenses under the section directly to the department on presentation of an itemized written statement from the commissioner. Additionally, §401.152 provides that the commissioner shall determine the salary of an examiner participating in an examination of an insurer's books or records located in another state based on the salary rate recommended by the National Association of Insurance Commissioners or the examiner's regular salary rate.

Insurance Code §401.155 requires the department to impose additional assessments against insurers on a pro rata basis as necessary to cover all expenses and disbursements required by law and to comply with Insurance Code Chapter 401, Subchapter D, and §§401.103, 401.104, 401.105, and 401.106.

Insurance Code §401.156 requires the department to deposit any assessments or fees collected under Insurance Code Chapter 401, Subchapter D, relating to the examination of insurers and other regulated entities by the financial examinations division or actuarial division, as those terms are defined by Insurance Code §401.251, to the credit of an account with the Texas Treasury Safekeeping Trust Company to be used exclusively to pay examination costs, as defined by Insurance Code §401.251, to reimburse the Texas Department of Insurance operating account for administrative support costs, and for premium tax credits for examination costs and examination overhead assessments. Additionally, §401.156 provides that revenue not related to the examination of insurers or other regulated entities by the financial examinations division or actuarial division be deposited to the credit of the Texas Department of Insurance operating account.

Insurance Code §843.156(h) provides that Insurance Code Chapter 401, Subchapter D, applies to an HMO, except to the extent that the commissioner determines that the nature of the examination of an HMO renders the applicability of those provisions clearly inappropriate.

Labor Code §407A.252(b) provides that the commissioner may recover the expenses of an examination of a workers' compensation self-insurance group under Insurance Code Article 1.16, which was recodified as Insurance Code §§401.151, 401.152, 401.155, and 401.156 by HB 2017, 79th Legislature, Regular Session, 2005, to the extent the maintenance tax under Labor Code §407A.302 does not cover those expenses.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Sara Waitt
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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CHAPTER 25. INSURANCE PREMIUM FINANCE

SUBCHAPTER E. EXAMINATIONS AND ANNUAL REPORTS

28 TAC §25.88

The Texas Department of Insurance adopts amendments to 28 Texas Administrative Code §25.88, concerning an assessment that will be used to cover the general administrative expenses of the department's regulation of insurance premium finance companies. The amendments are adopted without changes to the proposed text published in the November 14, 2014, issue of the *Texas Register* (39 TexReg 8913).

Under Government Code §2001.033(a)(1), the department's reasoned justification for these amendments is set out in this order, which includes the preamble and rules.

REASONED JUSTIFICATION. The amendments are necessary to adjust the rate of assessment to ensure that there are suffi-

cient funds to meet the expenses of performing the department's statutory responsibilities for examining, investigating, and regulating insurance premium finance companies. Under §25.88, the department levies an assessment on insurance premium finance companies licensed under Insurance Code Chapter 651 to cover the department's general administrative expenses for each fiscal year.

The department has determined that the estimated revenue need requires the collection of the minimum assessment amount of $250 from every insurance premium finance company for each calendar year, which is due to the department at the address provided on the invoice no later than April 1.

The following paragraphs explain the methodology the department used to determine its assessments for insurance premium finance companies for each year.

In general, the department's revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; the department's self-directed budget account, as established under Insurance Code §401.252; and premium finance exam assessments) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from the previous fiscal year.

To determine its total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1411 (SB 1), Acts of the 83rd Legislature, Regular Session, 2013 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by Insurance Code Subchapters D and F of Chapter 401 as approved by the commissioner of insurance for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of each fiscal year until the next assessment collection period. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the revenue need attributed to each funding source using the following method:

For each section within the department that provides services directly to the public or the insurance industry, the department allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the examination assessment, the self-directed budget account as limited by Insurance Code §401.252, or another funding source.

The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated a percentage for each funding source by dividing the total directly allocated to each funding source by the total of the direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total of direct costs and administrative support costs for each funding source.

In regard to premium finance company examinations, the department's examination division based its current allocation on the number of hours market conduct staff performs examinations on the premium finance companies.

To complete the calculation of the revenue need, the department combined the costs allocated to the premium finance assessment source and the self-directed source attributable to regulation of premium finance insurance companies. The department subtracted the current fiscal year estimated amount of premium finance fee revenue and the estimated combined previous fiscal year ending fund balance of the premium finance assessment source and the self-directed budget account attributable to premium finance from the amount of the combined costs for regulation of premium finance insurance companies. The resulting balance was the amount of revenue need for the purpose of calculating the premium finance assessment rate. The department divided the revenue need by the estimated loan dollar volume to determine the proposed rate of assessment for premium finance insurance companies. Based on this, the department determined that the estimated revenue need requires the collection of the minimum assessment amount of $250 from each insurance premium finance company.

The following paragraphs provide a brief summary and analysis of the reasons for the adopted amendments.

The department amends the first sentence of the section to update the reference when the assessment is due and substitutes "of each year" after April 1 instead of a specific year to reflect the payment is due every year. If the assessment does not change, then §25.88 will not have to be amended annually to change the year.

The department amends the second sentence of the section relating to where payments must be sent. The department deletes the specific address and adds that the address can be found on department invoices sent to premium finance companies. If the assessment amount does not change, then §25.88 will not have to be amended when the address changes.

The department makes nonsubstantive amendments to conform with the department's writing style guides. In the first sentence, the department deletes the word "each" and adds the word "every" before insurance premium finance company so that "each" is not used twice in the same sentence.

SUMMARY OF COMMENTS. The department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under Insurance Code §§201.001(a)(1), (b), and (c); 651.003; 651.005(b); 651.006(a); and 36.001.

Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner shall administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance op-

erating account may be used for any purpose for which money in the account is authorized to be used by law.

Insurance Code §651.003 authorizes the commissioner to adopt and enforce rules necessary to administer Insurance Code Chapter 651.

Insurance Code §651.005(b) requires that the department deposit an assessment or fee associated with examination costs, as defined by §401.251, to the account described by §401.156(a).

Insurance Code §651.006(a) requires each insurance premium finance company licensed by the department to pay an amount imposed by the department to cover the direct and indirect costs of examinations and investigations and a proportionate share of general administrative expenses attributable to regulation of insurance premium finance companies.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Sara Waitt
General Counsel
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 311. WATERSHED PROTECTION
SUBCHAPTER G. LAKES WORTH, EAGLE MOUNTAIN, BRIDGEPORT, CEDAR CREEK, ARLINGTON, BENBROOK, AND RICHLAND-CHAMBERS

30 TAC §§311.61, 311.62, 311.67

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §311.61 and §311.62; and new §311.67.

Section 311.61 is adopted *with change* to the proposed text as published in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5102). Section 311.62 and §311.67 are adopted *without changes* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

On February 6, 2013, the Tarrant Regional Water District (petitioner or TRWD) filed a petition for rulemaking that proposed amending §311.61 and §311.62 and adding §311.67, to correct the definitions of "Benbrook Lake watershed" and "Benbrook Lake water quality area," and require an effluent limit of 1.0 milligram per liter (mg/L) for total phosphorus for new or amended domestic wastewater discharges to the Benbrook Lake water quality area and Benbrook Lake watershed, based on discharge flow volume and location. In addition to correcting definitions, the purpose of the petitioner's requested rulemaking was to protect water quality in Benbrook Lake by limiting additional nutrient enrichment in the reservoir and the associated problems that enrichment can cause.

The petitioner provided several lines of support to justify the proposed rulemaking. The petitioner took part in a regional wastewater treatment needs study that projected increasing volumes of domestic wastewater through the year 2030 due to expected population growth in the Benbrook Lake watershed. Using a water quality simulation model, the study estimated the effluent quality requirements necessary to protect water quality in the lake. The evaluation predicted that requiring a total phosphorus effluent limit of 1.0 mg/L would prevent lake concentrations of the nutrient-loading response variable chlorophyll-*a* from increasing significantly beyond the TCEQ-proposed chlorophyll-*a* criterion for Benbrook Lake.

The petitioner also sponsored a study of trends in the water quality data collected from Benbrook Lake. The study found significant increasing trends in concentrations of chlorophyll-*a,* total phosphorus, and total nitrogen in the lake. It was expected that the proposed effluent limit for total phosphorus would lessen the upward trend of lake chlorophyll-*a* concentrations. The petitioner also noted that the TCEQ Texas Water Quality Integrated Report has reported chlorophyll-*a,* or excessive algal growth concerns, in Benbrook Lake in all biennial report years dating back to 2002. Furthermore, the petitioner used a soil and water analysis model of the watersheds of two of its other system reservoirs to demonstrate that most (over 80%) of the phosphorus generated by point and nonpoint sources in the watersheds is delivered to the reservoirs, indicating the potential effectiveness of phosphorus control for additional wastewater loading to the lake. The model results were also linked to the water quality simulation tool and showed that the reservoirs were most sensitive to cumulative loads as opposed to individual loadings.

The petitioner lastly reviewed the TCEQ's procedures for evaluating on a permit-by-permit basis the need for phosphorus effluent limits. The petitioner indicated that the TCEQ procedures do not adequately take into account water quality trends, anticipated future wastewater loading, and cumulative impacts from other wastewater discharges. In addition, the evaluation of individual discharges using TCEQ procedures in certain cases may not result in the recommendation of total phosphorus effluent limits for the targeted new or increasing discharges of 0.1 million gallons per day (MGD) or greater in the Benbrook Lake water quality area and 0.25 MGD or greater in the Benbrook Lake watershed.

The TCEQ reviewed the information provided by the petitioner and agrees that the rulemaking is an effective approach to further protect water quality in Benbrook Lake.

Section by Section Discussion

§311.61, Definitions

The commission adopts the amended references to "Lake Benbrook," which are corrected to reflect the reservoir's proper name, Benbrook Lake. To that end, the terms "Lake Benbrook water quality area" and "Lake Benbrook watershed" are renamed "Benbrook Lake water quality area" and "Benbrook Lake watershed," respectively. This change also necessitated a change in the alphabetical order and numeric sequencing of definitions, specifically, paragraphs (2) - (10). The water quality area definition contains two references to "Lake Benbrook" that are changed to "Benbrook Lake." The one reference to "Lake Benbrook" in the watershed definition is changed to "Benbrook Lake." The definition of "Benbrook Lake water quality area" is reworded in response to TRWD's comment to provide further clarity regarding the area's boundary. The definition of "Benbrook Lake watershed" is revised to correct an error in the current definition. The current definition sets the upper watershed boundary as "a point 200 meters downstream from U.S. 337 in Tarrant County." U.S. 337 is a nonexistent highway, and if U.S. Highway 377 was the intended reference, the resulting watershed area would be smaller than the water quality area, which is inconsistent with the relationship between the watersheds and water quality areas of the other reservoirs included in Subchapter G. The revised definition of "Benbrook Lake watershed" clearly establishes the watershed boundary as the lake and its tributaries except for the upstream reservoir, Lake Weatherford, and that reservoir's tributaries.

§311.62, Scope

The commission adopts amended §311.62, to accommodate the addition of §311.67, Nutrient Control, which institutes a total phosphorus limit for certain discharges into the Benbrook Lake water quality area and watershed. The original scope of the subchapter focused only on discharges to reservoir water quality areas, so an exception was added for §311.67. The phrase "and discharges directly into these lakes" is removed from the original scope statement because it is unnecessary. The definition of each of the other reservoir water quality areas includes the reservoir itself. An additional sentence is added to §311.62 to indicate that §311.61 and §311.66 also apply to discharges to the Benbrook Lake watershed. A clarifying statement is added to the end of §311.62 that limits the scope of §311.67 only to discharges into the Benbrook Lake water quality area and watershed.

§311.67, Nutrient Control

The commission adopts new §311.67. Subsection (a) requires a daily average effluent limit for total phosphorus of 1.0 mg/L for domestic wastewater discharges, from treatment systems other than oxidation pond systems, into either the Benbrook Lake watershed or water quality area. Discharges into the Benbrook Lake watershed with a permitted flow less than 0.25 MGD, and discharges into the Benbrook Lake water quality area, with a permitted flow less than 0.10 MGD, are exempt from the effluent limit requirement. Subsection (b) stipulates that for discharge permits with multiple flow phases, the requirements of subsection (a) apply only to qualifying flow phases. Subsection (c) further clarifies that for permits with more than one discharge outfall, the permitted flow for all the outfalls would be combined to determine if the permit meets the flow criteria of subsection (a). Subsection (d) further limits the applicability of subsection (a) to new discharge permits and existing permits that increase the permitted flow of the discharge.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to establish a phosphorus limit for discharge permits when the permittee is discharging into the Benbrook Lake watershed or Benbrook Lake water quality area, depending on the permit's flow volume limit. The specific intent of the rulemaking is to amend the commission's rules to establish a phosphorus limit that does protect the environment and reduces risks to human health from environmental exposure but that will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the rulemaking does not meet the definition of a "major environmental rule."

Even if the rulemaking was a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed a standard set by federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not adopted solely under the general powers of the agency but rather specifically under Texas Water Code (TWC), §26.0135, which authorizes the commission to monitor and assess the water quality of each watershed in the state; TWC, §26.027, which authorizes the commission to issue permits; and TWC, §26.121, which authorizes the commission to prohibit unauthorized discharges. Therefore, this rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to establish a phosphorus limit that will apply to wastewater discharges into the Benbrook Lake watershed and water quality area. The rulemaking will substantially advance this stated purpose by adding a daily average phosphorus limit of 1 mg/L that

will only apply to discharges into the Benbrook Lake watershed and water quality area to Chapter 311, Subchapter G of the commission's rules.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The commission has been delegated as the regulatory agency that administers the state National Pollutant Discharge Elimination System program under federal Clean Water Act, §402 and, therefore, is responsible for establishing effluent limitations to protect water quality in a specific portion of a navigable water to protect public health, public water supplies, agricultural and industrial uses, wildlife, and recreational activities under federal Clean Water Act, §302.

Nevertheless, the commission further evaluated this rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this rulemaking will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rulemaking requires compliance with a phosphorus effluent limitation related to discharges into the Benbrook Lake watershed and water quality area without burdening nor restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The commission held a public hearing on July 24, 2014, in Austin. The comment period closed on August 4, 2014. The commission received one written comment from TRWD.

Response to Comments

Comment

TRWD commented that while they generally agree with the proposed changes to the rules, the definitions of "Benbrook Lake watershed" and "Benbrook Lake water quality area" should be reworded to avoid potential ambiguities. The suggested Benbrook Lake water quality area definition is "the Benbrook Lake watershed except for those portions that are more than five stream miles upstream of the pool level of Benbrook Lake (694.0 feet, mean sea level)." The suggested Benbrook Lake watershed definition is "Benbrook Lake and its tributaries except Lake Weatherford and tributaries above Lake Weatherford."

Response

The TCEQ agrees with this comment and has incorporated the suggested revisions into adopted §311.61. To provide greater clarity, the TCEQ inserted the word "the" before the second occurrence of the word "tributaries" in the amended definition of "Benbrook Lake watershed."

Statutory Authority

This rulemaking is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.120, which requires the commission to administer the law so as to promote the conservation and protection of the quality of the state's environment and natural resources; TWC, §26.0135, which authorizes the commission to monitor and assess the water quality of each watershed and river basin in the state; TWC, §26.023, which authorizes the commission to set water quality standards for water in the state by rule; TWC, §26.027, which authorizes the commission to issue permits; and TWC, §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted rulemaking implements TWC, §§26.0135, 26.023, 26.027, and 26.121.

§311.61. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) BOD_5--Biochemical oxygen demand (five-day).

(2) Benbrook Lake water quality area--The Benbrook Lake watershed except for those portions that are more than five stream miles upstream of the pool level of Benbrook Lake (694.0 feet, mean sea level).

(3) Benbrook Lake watershed--Benbrook Lake and its tributaries except Lake Weatherford and the tributaries above Lake Weatherford.

(4) Cedar Creek reservoir water quality area--Those portions of the Cedar Creek Reservoir watershed within five stream miles upstream of the pool level of Cedar Creek Reservoir (322.0 feet, mean sea level).

(5) Cedar Creek Reservoir watershed--Cedar Creek Reservoir and its tributaries located between Joe B. Hoggsett Dam and a point along Cedar Creek up to the normal pool elevation.

(6) DO--Dissolved oxygen.

(7) Eagle Mountain Lake water quality area--Those portions of the Eagle Mountain Lake watershed within five stream miles upstream of the pool level of Eagle Mountain Lake (649.1 feet, mean sea level).

(8) Eagle Mountain Lake watershed--Eagle Mountain Lake and its tributaries located between Eagle Mountain Dam and a point 0.6 kilometers downstream from the confluence of Oates Branch.

(9) Lake Arlington water quality area--Those portions of the Lake Arlington watershed within five stream miles upstream of the pool level of Lake Arlington (550.0 feet, mean sea level).

(10) Lake Arlington watershed--Lake Arlington and its tributaries located between Arlington Dam up to the normal pool elevation along Village Creek.

(11) Lake Bridgeport water quality area--Those portions of the Lake Bridgeport watershed within five steam miles upstream of the pool level of Lake Bridgeport (836.0 feet, mean sea level).

(12) Lake Bridgeport watershed--Lake Bridgeport and its tributaries located between Bridgeport Dam to a point immediately upstream from the confluence of Bear Hollow.

(13) Lake Worth water quality area--Those portions of the Lake Worth watershed within five stream miles upstream of the pool level of Lake Worth (594.3 feet, mean sea level).

(14) Lake Worth watershed--Lake Worth and its tributaries located between Lake Worth Dam and a point 4.0 kilometers downstream from Eagle Mountain Dam.

(15) Mg/liter--Milligram per liter.

(16) Oxidation pond system--Facility in which oxidation ponds are the primary process used for secondary treatment and in which the ponds have been designed and constructed in accordance with applicable design criteria.

(17) Richland-Chambers reservoir water quality area--Those portions of the Richland-Chambers Reservoir watershed within five stream miles upstream of the pool level of Richland-Chambers Reservoir (315.0 feet, mean sea level).

(18) Richland-Chambers watershed--Richland-Chambers Reservoir and its tributaries located between Richland Creek Dam and a point along Richland Creek up to the normal pool level.

(19) TSS--Total suspended solids.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6812

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§335.1, 335.29, 335.155, 335.211, 335.261, 335.431, 335.503, and 335.504.

Section 335.1 and §335.211 are adopted *with changes* to the proposed text as published in the August 22, 2014, issue of the *Texas Register* (39 TexReg 6376). Sections 335.29, 335.155, 335.261, 335.431, 335.503, and 335.504 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act of 1976 (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations regularly to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under the RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990; July 23, 1990; October 21, 1991; December 4, 1992; June 27, 1994; November 26, 1997; October 18, 1999; September 11, 2000; June 14, 2005 (parts of Clusters III - X); March 5, 2009 (parts of Clusters XI - XV) and May 7, 2012 (parts of Clusters IX and XV - XVIII). In addition, Texas submitted an authorization package to EPA for parts of Clusters XIX, XX, and XXI in March 2013. After receiving no public comments to its September 3, 2014, publication in the *Federal Register* (79 FR 52220), EPA is expected to approve this authorization package effective October 2014.

The commission adopts in this rulemaking certain parts of RCRA Rule Clusters XXI, XXII, and XXIII that implement revisions to the federal hazardous waste program. EPA made these revisions between June 1, 2011, and January 3, 2014. The commission adopts optional federal rule changes in these clusters. Although not necessary in order to maintain RCRA authorization, EPA recommends that the optional federal rule changes be incorporated into the state rules. Establishing equivalency with federal regulations will enable Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA. All adopted rule changes are discussed further in the Section by Section Discussion portion of this preamble.

Section by Section Discussion

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating references to Texas State Agencies, updating cross-references, and correcting typographical, spelling, and grammatical errors.

§335.1, Definitions

The commission adopts renumbering of definitions in §335.1 to add four new definitions.

The commission adopts an amendment to §335.1(16) to conform to federal regulations promulgated in the January 3, 2014, issue of the *Federal Register* (79 FR 350). Specifically, this amendment will add the definition of "Carbon dioxide stream" so that it

is consistent with the EPA definition in 40 Code of Federal Regulations (CFR) §260.10.

The commission adopts an amendment to §335.1(104) to conform to federal regulations promulgated in the July 31, 2013, issue of the *Federal Register* (78 FR 46448). Specifically, this amendment will add the definition of "No free liquids" so that it is consistent with the EPA definition in 40 CFR §260.10.

The commission adopts an amendment to §335.1(140)(A)(iv) to conform to federal regulations promulgated in the July 31, 2013, issue of the *Federal Register* (78 FR 46448). Specifically, this amendment will revise the definition of "Solid waste" to conditionally exclude solvent-contaminated wipes that are cleaned and reused and revises the definition of "Hazardous waste" to conditionally exclude solvent-contaminated wipes that are disposed. The purpose of this adopted amendment is to provide a consistent regulatory framework that is appropriate to the level of risk posed by solvent-contaminated wipes in a way that maintains protection of human health and the environment, while reducing overall compliance costs for industry, many of which are small businesses.

The commission adopts an amendment to §335.1(141) to conform to federal regulations promulgated in the July 31, 2013, issue of the *Federal Register* (78 FR 46448). Specifically, this amendment will add the definition of "Solvent-contaminated wipe" so that it is consistent with the EPA definition in 40 CFR §260.10.

The commission adopts an amendment to §335.1(174) to conform to federal regulations promulgated in the July 31, 2013, issue of the *Federal Register* (78 FR 46448). Specifically, this amendment will add the definition of "Wipe" so that it is consistent with the EPA definition in 40 CFR §260.10.

§335.29, Adoption of Appendices by Reference

The commission adopts an amendment to §335.29(3) to conform to federal regulations previously promulgated in the December 17, 2010, issue of the *Federal Register* (75 FR 78918). This amendment removes saccharin and its salts from the lists of hazardous constituents and commercial chemical products which are hazardous wastes when discarded or intended to be discarded. This exclusion was adopted in a previous rulemaking, but the correct amendment date and federal register page were inadvertently not updated.

§335.155, Additional Reports

The commission adopts an amendment to §335.155(1) to correct a typographical error. Specifically, this amendment will correct a citation from 40 CFR §264.56(j) to 40 CFR §264.56(i).

§335.211, Applicability

The commission adopts an amendment to §335.211(b) to conform to federal regulations promulgated in the April 13, 2012, issue of the *Federal Register* (77 FR 22229). Specifically, this amendment will make a conforming change to alert certain recycling facilities that they have existing certification and notification requirements under the Land Disposal Restrictions (LDR) regulations.

§335.261, Universal Waste Rule

The commission adopts an amendment to §335.261(b)(15) to correct two typographical errors. Specifically, this amendment will change a reference from 40 CFR §273.8(a)(1) to 40 CFR §273.8(a)(2) and change a reference from 40 CFR §261.4(b)(1) to 40 CFR §261.5.

§335.431, Purpose, Scope and Applicability

The commission adopts an amendment to §335.431 to conform to federal regulations promulgated in the June 13, 2011, issue of the *Federal Register* (76 FR 34147). Specifically, this amendment will revise the LDR treatment standards for hazardous wastes from the production of carbamates and carbamate commercial chemical products, and off-specification or manufacturing chemical intermediates and container residues that become hazardous wastes when they are discarded or intended to be discarded. Currently, under the LDR program, most carbamate wastes must meet numeric concentration limits before they can be land disposed. However, the lack of readily available analytical standards makes it difficult for a generator to measure whether the numeric LDR concentration limits have been met. Therefore, this amendment will provide as an alternative standard the use of the best demonstrated available technologies for treating these wastes. In addition, this amendment will remove carbamate Regulated Constituents from the table of Universal Treatment Standards.

§335.503, Waste Classification and Waste Coding Required

The commission adopts an amendment to §335.503(b)(8) to correct a typographical error. Specifically, this amendment will change a citation from §335.10(g) to §335.10(e).

§335.504, Hazardous Waste Determination

The commission adopts an amendment to §335.504(1) to conform to federal regulations promulgated in the July 31, 2013, issue of the *Federal Register* (78 FR 46448). Specifically, this amendment will revise the definition of "Solid waste" to conditionally exclude solvent-contaminated wipes that are cleaned and reused and will revise the definition of "Hazardous waste" to conditionally exclude solvent-contaminated wipes that are disposed. The purpose of this adopted amendment is to provide a consistent regulatory framework that is appropriate to the level of risk posed by solvent-contaminated wipes in a way that maintains protection of human health and the environment, while reducing overall compliance costs for industry, many of which are small businesses.

The commission adopts an amendment to §335.504(1) to conform to federal regulations promulgated in the January 3, 2014, issue of the *Federal Register* (79 FR 350). Specifically, this amendment will conditionally exclude carbon dioxide (CO_2) streams that are hazardous from the definition of "Hazardous waste," provided the generator captures these hazardous CO_2 streams from emission sources, injects the CO_2 streams into Underground Injection Control Class VI wells for purposes of geologic sequestration (GS), and meets certain other conditions. The management of these CO_2 streams, when meeting certain conditions, does not present a substantial risk to human health or the environment, and therefore additional regulation pursuant to hazardous waste regulations is unnecessary. This amendment will substantially reduce the uncertainty associated with identifying these CO_2 streams under Subtitle C of RCRA and will also facilitate the deployment of GS by providing additional regulatory certainty.

The commission adopts an amendment to §335.504(3) to conform to federal regulations promulgated in the April 13, 2012, issue of the *Federal Register* (77 FR 22229). Specifically, this amendment will correct a typographical error in the entry "K107"

in the table listing hazardous wastes from specific sources at 40 CFR §261.32.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a "major environmental rule" because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there will be no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because either the changes are not substantive, or the regulated community will benefit from the greater flexibility and reduced compliance burden. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal rules, equivalent state rules will not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the adopted rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a "major environmental rule." Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). First, the adopted rulemaking does not exceed a standard set by federal law because the commission adopts this rulemaking to implement revisions to the federal hazardous waste program. The commission must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program. The other adopted changes do not alter substantive requirements although various changes may increase flexibility for the regulated community. Second, although the rulemaking adopts some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program. Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the waste program. And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission adopts this rulemaking under Texas Water Code, §5.103 and §5.105 and under Texas Health and Safety Code, §361.017 and §361.024.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments on the draft regulatory impact analysis determination were received.

Takings Impact Assessment

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 applies. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4). The specific purpose of the rulemaking is to maintain state RCRA authorization by adopting state hazardous waste rules that are equivalent to the federal regulations. The rulemaking substantially advances this purpose by adopting rules that incorporate and refer to the federal regulations. Promulgation and enforcement of the rules is not a statutory or constitutional taking of private real property. Specifically, the adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally burden the owner's right to property, does not restrict or limit the owner's right to property, and does not reduce the value of property by 25% or more beyond that which will otherwise exist in the absence of the regulations. The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules does not burden, restrict, or limit the owner's right to property and does not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is to protect, preserve, restore and enhance the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rulemaking will update and enhance the commission's rules concerning hazardous waste facilities. In

addition, the rules will not violate any applicable provisions of the CMP's stated goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments regarding the consistency of this rulemaking were received.

Public Comment

The commission held a public hearing on this proposal in Austin on September 16, 2014, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on September 22, 2014. The commission received no public comments.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.1, §335.29

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted amendments implement THSC, Chapter 361.

§335.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings.

(1) Aboveground tank--A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. *(See* also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and production of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §1.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.201; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq.)*.

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on site, or to a point of shipment for disposal off site. Such devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Area of concern--Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) Battery--As defined in §335.261 of this title (relating to Universal Waste Rule).

(12) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream); and

(ii) fluidized bed combustion units;

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance To Be Classified as a Boiler).

(13) Captive facility--A facility that accepts wastes from only related (within the same corporation) off-site generators.

(14) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(15) Captured receiver--A receiver that is located within the property boundaries of the generators from which it receives waste.

(16) Carbon dioxide stream--Carbon dioxide that has been captured from an emission source (e.g., power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.

(17) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(18) Cathode ray tube or CRT--A vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device. A used, intact CRT means a CRT whose vacuum has not been released. A used, broken CRT means its glass has been removed from its housing, or casing whose vacuum has been released.

(19) Certification--A statement of professional opinion based upon knowledge and belief.

(20) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(21) Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as hazardous, Class 1, or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(22) Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(23) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. *(See* also "active portion" and "inactive portion.")

(24) Closure--The act of permanently taking a waste management unit or facility out of service.

(25) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(26) Component--Either the tank or ancillary equipment of a tank system.

(27) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(28) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(29) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(30) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.112(a)(21) or §335.152(a)(19) of this title (relating to Standards).

(31) Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter; "pollutant" as defined in Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.401; "hazardous substance" as defined in THSC, §361.003; and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC, §§26.261 - 26.267.

(32) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, groundwater or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(33) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(34) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(35) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(36) Cathode Ray Tube collector--A person who receives used, intact Cathode Ray Tubes for recycling, repair, resale, or donation.

(37) Cathode Ray Tube glass manufacturer--An operation or part of an operation that uses a furnace to manufacture Cathode Ray Tube glass.

(38) Cathode Ray Tube processing--Conducting all of the following activities:

(A) Receiving broken or intact Cathode Ray Tubes (CRTs);

(B) Intentionally breaking intact CRTs or further breaking or separating broken CRTs; and

(C) Sorting or otherwise managing glass removed from CRT monitors.

(39) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(40) Designated facility--A hazardous waste treatment, storage, or disposal facility which: has received a permit (or interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124; has received a permit (or interim status) from a state authorized in accordance with 40 CFR Part 271; or is regulated under 40 CFR §261.6(c)(2) or 40 CFR Part 266, Subpart F and has been designated on the manifest by the generator pursuant to 40 CFR §262.20. For hazardous wastes, if a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste. For Class 1 wastes, a designated facility is any treatment, storage, or disposal facility authorized to receive the Class 1 waste that has been designated on the manifest by the generator. Designated facility also means a generator site designated on the manifest to receive its waste as a return shipment from a facility that has rejected the waste in accordance with §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities).

(41) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(42) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(43) Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(44) Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(45) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(46) Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(47) Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(48) Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(49) United States Environmental Protection Agency (EPA) acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(50) United States Environmental Protection Agency (EPA) hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) Part 261, Subpart D and to each characteristic identified in 40 CFR Part 261, Subpart C.

(51) United States Environmental Protection Agency (EPA) identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(52) Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or United States Environmental Protection Agency limits for drinking water as published in the *Federal Register*.

(53) Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(54) Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(55) Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations--which cannot be canceled or modified without substantial loss--for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(56) Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance, damaged or deteriorated explosives or munitions, an improvised explosive device, other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(57) Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(58) Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal, technical escort unit, and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(59) Extrusion--A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(60) Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) or §335.602(a)(5) of this title (relating to Standards), all contiguous property under the control of the owner or operator seeking a permit for the treatment, storage, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste).

(61) Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(62) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(63) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(64) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(65) Gasification--For the purpose of complying with 40 Code of Federal Regulations §261.4(a)(12)(i), gasification is a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas.

(66) Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(67) Groundwater--Water below the land surface in a zone of saturation.

(68) Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the Resource Conservation and Recovery Act of 1976, §3001 (42 United States Code, §6921). The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 261. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(69) Hazardous substance--Any substance designated as a hazardous substance under 40 Code of Federal Regulations Part 302.

(70) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste

Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*

(71) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(72) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly- or privately-owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(73) Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(74) In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(75) Inactive portion--That portion of a facility which is not operated after November 19, 1980. *(See* also "active portion" and "closed portion.")

(76) Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(77) Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(78) Individual generation site--The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(79) Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(80) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(81) Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(82) Inground tank--A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(83) Injection well--A well into which fluids are injected. *(See* also "underground injection.")

(84) Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(85) Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(86) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(87) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(88) Land treatment facility--A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(89) Landfill--A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(90) Landfill cell--A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(91) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(92) Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(93) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(94) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(95) Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(96) Manifest--The waste shipping document, United States Environmental Protection Agency (EPA) Form 8700-22 (including, if necessary, EPA Form 8700-22A), originated and signed by the generator or offeror in accordance with the instructions in §335.10 of this title and the applicable requirements of 40 Code of Federal Regulations Parts 262 - 265.

(97) Manifest tracking number--The alphanumeric identification number (i.e., a unique three-letter suffix preceded by nine numerical digits), which is pre-printed in Item 4 of the manifest by a registered source.

(98) Military munitions--All ammunition products and components produced or used by or for the Department of Defense (DOD) or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(99) Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research, Development, and Demonstration Permits).

(100) Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(101) Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency.

(102) Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(103) New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. *(See* also "existing tank system.")

(104) No free liquids--As used in 40 Code of Federal Regulations (CFR) §261.4(a)(26) and (b)(18), means that solvent-contaminated wipes may not contain free liquids as determined by Method 9095B (Paint Filter Liquids Test), included in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication SW-846), which is incorporated by reference, and that there is no free liquid in the container holding the wipes.

(105) Off-site--Property which cannot be characterized as on-site.

(106) Onground tank--A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(107) On-Site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(108) Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. *(See* also "incineration" and "thermal treatment.")

(109) Operator--The person responsible for the overall operation of a facility.

(110) Owner--The person who owns a facility or part of a facility.

(111) Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(112) PCBs or polychlorinated biphenyl compounds--Compounds subject to 40 Code of Federal Regulations Part 761.

(113) Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste or industrial solid waste treatment, storage, or disposal facility in accordance with specified limitations.

(114) Personnel or facility personnel--All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(115) Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(116) Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code (USC), §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils; and

(xii) used oils--See definition for "used oil" in this section.

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 USC, §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials--i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(117) Pile--Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(118) Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(119) Post-closure order--An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from Resource Conservation and Recovery Act and solid waste management units.

(120) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(121) Poultry carcass--The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(122) Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(123) Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(124) Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(125) Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(126) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(127) Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(128) Regional administrator--The regional administrator for the United States Environmental Protection Agency region in which the facility is located, or his designee.

(129) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(130) Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under §335.166(5) of this title (relating to Corrective Action Program) or §335.167(c) of this title.

(131) Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for treatment, storage, or disposal.

(132) Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or United States Environmental Protection Agency or state approved corrective action.

(133) Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(134) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(135) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(136) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(137) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means offsite.

(138) Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound of sludge treated on a wet-weight basis.

(139) Small quantity generator--A generator who generates less than 1,000 kilograms of hazardous waste in a calendar month.

(140) Solid waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued in accordance with Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored, or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated.

Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation of Waste Disposal), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with the Texas Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq.,* as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §§261.4(a)(1) - (22), and (26), 261.39, and 261.40, as amended through July 31, 2013 (78 FR 46448), subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusions under 40 CFR §261.39 and §261.40, 40 CFR §261.41 is adopted by reference as amended through July 28, 2006 (71 FR 42928). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'solid Waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'solid Waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'solid Waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to §335.1(140)(D)(iv) " of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or will be considered nonhazardous waste

if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed.

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure: 30 TAC §335.1(140)(D)(iv)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) and (2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that will otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as will be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel, or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Subchapter R of this chapter (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Subchapter R of this chapter; and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) with the exception of the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production

process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title, §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities).

(141) Solvent-contaminated wipe--A wipe that, after use or after cleaning up a spill, either:

(A) contains one or more of the F001 through F005 solvents listed in 40 Code of Federal Regulations (CFR) §261.31 or the corresponding P- or U-listed solvents found in 40 CFR §261.33;

(B) exhibits a hazardous characteristic found in 40 CFR Part 261, Subpart C, when that characteristic results from a solvent listed in 40 CFR Part 261; and/or

(C) exhibits only the hazardous waste characteristic of ignitability found in 40 CFR §261.21 due to the presence of one or more solvents that are not listed in 40 CFR Part 261. Solvent-contaminated wipes that contain listed hazardous waste other than solvents, or exhibit the characteristic of toxicity, corrosivity, or reactivity due to contaminants other than solvents, are not eligible for the exclusions at 40 CFR §261.4(a)(26) and (b)(18).

(142) Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(143) Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(144) Staging pile--An accumulation of solid, non-flowing remediation waste, as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(145) Standard permit--A Resource Conservation and Recovery Act (RCRA) permit authorizing management of hazardous waste issued under Chapter 305, Subchapter R of this title (relating to Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units) and Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit). The standard permit may have two parts, a uniform portion issued in all cases and a supplemental portion issued at the executive director's discretion.

(146) Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(147) Sump--Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste treatment, storage, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(148) Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(149) Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(150) Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(151) TEQ--Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(152) Thermal processing--The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. *(See* also "incinerator" and "open burning.")

(153) Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(154) Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(155) Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(156) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(157) Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(158) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(159) Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 Code of Federal Regulations §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(160) Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(161) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(162) Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. *(See* also "injection well.")

(163) Underground tank--A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(164) Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(165) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(166) Universal waste handler--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(167) Universal waste transporter--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(168) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(169) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(170) Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, conditionally exempt small quantity generator hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil Standards) and 40 Code of Federal Regulations Part 279 (Standards for Management of Used Oil).

(171) Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq.,* §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(172) Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(173) Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(174) Wipe--A woven or non-woven shop towel, rag, pad, or swab made of wood pulp, fabric, cotton, polyester blends, or other material.

(175) Zone of engineering control--An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §335.155

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt

any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC. The adopted amendment implements THSC, Chapter 361.

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SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES

DIVISION 1. RECYCLABLE MATERIALS USED IN A MANNER CONSTITUTING DISPOSAL

30 TAC §335.211

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC. The adopted amendment implements THSC, Chapter 361.

§335.211. Applicability.

(a) The regulations of this section and §§335.212 - 335.214 of this title (relating to Standards Applicable to Generators and Transporters of Materials Used in a Manner that Constitutes Disposal; Standards Applicable to Storers of Materials That Are To Be Used In a Manner that Constitutes Disposal Who Are Not the Ultimate Users; and Standards Applicable to Users of Materials That Are Used in a Manner that Constitutes Disposal) apply to recyclable materials that are applied to or placed on the land:

(1) without mixing with any other substance(s);

(2) after mixing or combination with any other substance(s). These materials will be referred to throughout this subpart as materials used in a manner that constitutes disposal.

(b) Products produced for the general public's use that are used in a manner that constitutes disposal and that contain recyclable materials are not presently subject to regulation if the recyclable materials have undergone a chemical reaction in the course of producing the product so as to become inseparable by physical means and if such products meet the applicable treatment standards in 40 Code of Federal Regulations (CFR), Part 268, Subpart D (or applicable prohibition levels in 40 CFR §268.32 or Resource Conservation Recovery Act, §3004(d), where no treatment standards have been established) for each recyclable material (i.e., hazardous waste) that they contain, and the recycler complies with 40 CFR §268.7(b)(6). Commercial fertilizers that are produced for the general public's use that contain recyclable materials also are not presently subject to regulation provided they meet these same treatment standards or prohibition levels for each recyclable material that they contain. However, zinc-containing fertilizers using hazardous waste K061 that are produced for the general public's use are not presently subject to regulation.

(c) Anti-skid/deicing uses of slags, which are generated from high temperature metals recovery (HTMR) processing of hazardous waste K061, K062, and F006, in a manner constituting disposal are not covered by the exemption in subsection (b) of this section and remain subject to regulation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 5. UNIVERSAL WASTE RULE

30 TAC §335.261

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC. The adopted amendment implements THSC, Chapter 361.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. LAND DISPOSAL RESTRICTIONS

30 TAC §335.431

Statutory Authority

The amendment is adopted under Texas Water Code (TWC) §5.103 (relating to Rules) and TWC §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC) §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC. The adopted amendment implements THSC, Chapter 361.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. WASTE CLASSIFICATION

30 TAC §335.503, §335.504

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC. The adopted amendments implement THSC, Chapter 361.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 100. MISCELLANEOUS

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of Subchapter C, consisting of §§100.151 - 100.169, concerning department responsibility for minimizing fraud and abuse; confidentiality of fraud or abuse investigation records; statutory bases; department responsibilities in relation to provider fraud and abuse; grounds for fraud referral and administrative sanction; administrative sanctions/actions, restitution, and recoupment; definitions; administrative sanctions and actions; scope of sanction; imposing a sanction; notice of adverse action; informing other interested parties; provider education; request for reinstatement; obligation of health care practitioners and providers; department responsibility for recovery of funds; recovery from providers; recovery when fraud is involved; provider re-enrollment or provider contract or agreement modification; the repeal of Subchapter F, consisting of §§100.251 - 100.267, concerning purpose; application; definitions; office of internal audit authority and function; responsibilities of the audit committee chairman and the Texas Department of Mental Health and Mental Retardation (TDMHMR) board; responsibilities of the director; access to records; standards of conduct; standards for conducting audits and investigations; scope of audit work; exit conference procedures for audits; responses to audit findings; final audit report distribution; implementing audit recommendations; investigating alleged fraud, misconduct, or other wrongdoing; references; distribution; and the repeal of Subchapter H, consisting of §§100.353 - 100.356, 100.358 - 100.369, and 100.371 - 100.381, concerning confidentiality of records; freedom of choice; allowable services and limitations; dental examination

and treatment; preventive services; therapeutic services; orthodontic services; eligibility for orthodontic services; application for participation; requirements for participation; orthodontic provider participation; post-payment review; termination of a provider agreement; maximum payment; charges to ICF/MR; payment of claims; time limits, return, and denial of claims; dental problems discovered by the utilization-review dentist; utilization of peer review or grievance committees; utilization of Texas State Board of Dental Examiners; types of reviews; notification to provider about utilization review; provider cooperation; report of findings; classification of review findings; restitution of overpayments; and administrative actions, in Chapter 100, Miscellaneous, without changes to the proposal as published in the October 17, 2014, issue of the *Texas Register* (39 TexReg 8237).

When the health and human service agencies were reorganized in 2004, TDMHMR rules were administratively transferred to Title 40 from Title 25 of the Texas Administrative Code. Rules that should be considered for repeal were transferred to Chapter 100. The three subchapters of Chapter 100 describe responsibilities of the former TDMHMR regarding fraud and abuse and recovery of benefits, internal audits and investigations, and the intermediate care facility for individuals with an intellectual disability dental program. These topics are now governed by rules of HHSC and the Department of State Health Services, and by the Texas Internal Audit Act (Government Code, Chapter 2102, Internal Auditing).

DADS has determined that the rules in Chapter 100 are no longer necessary.

DADS received no comments regarding adoption of the repeal.

SUBCHAPTER C. FRAUD AND ABUSE AND RECOVERY OF BENEFITS

40 TAC §§100.151 - 100.169

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4162

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SUBCHAPTER F. INTERNAL AUDITS AND INVESTIGATIONS

40 TAC §§100.251 - 100.267

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Effective date: January 5, 2015

Proposal publication date: October 17, 2014

For further information, please call: (512) 438-4162

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SUBCHAPTER H. DENTAL PROGRAM

40 TAC §§100.353 - 100.356, 100.358 - 100.369, 100.371 - 100.381

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human

Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 23. TRAVEL INFORMATION

The Texas Department of Transportation (department) adopts the repeal of §23.1 and §23.2, General Provisions; §23.10 and §§23.12 - 23.14, Travel Information; §23.28 and §23.29, Texas Highways Magazine; §§23.51 - 23.59, Promotional Product Program; and §§23.101 - 23.105, Merchandising Program; and simultaneously adopts new §23.1 and §23.2, General Provisions; §§23.11 - 23.20, Travel Information; §§23.41 - 23.50, Travel Information Centers; §§23.61 - 23.73, Promotional Product Program; and §§23.81 - 23.85, Subscriber and Purchaser Information, all relating to Travel Information. The repeals and new sections are adopted without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7877) and will not be republished.

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

The department is in the process of modernizing and streamlining Travel Information Division (division) program operations and services to reflect recent changes in federal and state law and to more accurately reflect modern processes and mediums used by the department to provide travel information and corresponding services to the traveling public. As part of the process, the department has determined that changes to the existing rules are necessary. Also, as part of a continuous effort by the department to make department rules more accessible and coherent to the public, the department is revising Texas Administrative Code, Title 43, Chapter 23, Travel Information to revise the organizational structure, headings, and language of the chapter to conform to the department's modern rule organizational structure. The new organizational structure subdivides the current rules into smaller sections and reorganizes them. The revision permits easier location of and access to specific provisions and makes the rules more understandable. To streamline this process the department is repealing all of the current rules relating to travel information operations in the chapter and simultaneously adding new sections covering those operations. A substantial majority of the new rules are non-substantive, format revisions of the current rules.

The substantive additions in the new rules are necessary to address changes in federal and state law pertaining to the allowance of certain commercial activities at rest area facilities. Public Law 112-141, the Moving Ahead for Progress in the 21st Century Act (MAP-21), amended federal law to allow commercial advertising and media displays to be exhibited within facilities constructed at rest areas, such as travel information centers. In response, the 83rd Texas Legislature (2013) amended Transportation Code, §204.003 to allow the department to sell commercial advertising space at travel information centers.

The substantive additions to the rules allow for the sale of advertising space at travel information centers in compliance with federal and state law. The new rules set out the department's policies and procedures for the sale of advertising space at travel information centers. In addition, the new rules harmonize the rules for the sales of advertising in department travel information with the rules for the sale of advertising space at travel information centers. This will allow the department to integrate both operations for the sale of advertising space, in an attempt to achieve savings and greater advertising revenue. The changes in the rules also will provide a single, consistent framework across all advertising programs in the division, allowing a person or entity seeking to purchase advertising space from the department to do so more easily.

New §23.1, Purpose and Scope, contains the purpose and scope of the chapter and is primarily the same language as current §23.1 with two substantive changes. First, the new section adds language stating that operation of the Promotional Product Program (program) is a function of the division. This addition is desirable because the program was added to the chapter in 2013 and while the program has been a function of the division since the program's creation, the rules do not currently reference the program in the chapter's purpose. Second, the new section removes a sentence which incorrectly states that the division directly serves the Texas Transportation Commission (commission). The division directly serves the Executive Director of the department.

New §23.2, Definitions, incorporates the following definitions from current §23.2 without change: "commission," "department," "director," and "division."

The new section incorporates and modifies the definition of "travel information center" from current §23.2 to more closely mirror the federal definition and create consistency with federal regulations. The new section incorporates and nominally modifies the definition of "travel information" from the term and definition of "travel literature" in current §23.2. This change more clearly defines the term and includes modern forms of media used by the department to deliver travel information to the traveling public.

The definitions for "purchaser" and "subscriber" are moved from current §23.2 to new §23.82 (relating to Subchapter E, Subscriber and Purchaser Information). The new section removes the definitions for "display case," "magazine," "metropolitan area," "promotional graphics, photographs and icons," "promotional posters," "purchaser and subscriber mailing list," "region," and "travel and tourism" because they are not used in the revision, and therefore are unnecessary.

The new section also adds definitions for "person" and "promotional product."

New §23.11, Purpose, revises and combines current §23.10(a) and (e)(1). The new section contains the purpose and scope of new Subchapter B (relating to Travel Information). It deletes unnecessary language from the combination of the subsections and simplifies the language. The new section is substantively the same as the revised provisions with a correction of the cite to the statutory authority for the subchapter.

New §23.12, Contracts for Travel Information, revises current §23.10(d) and deletes unnecessary terms that are covered by one statement in the new section. It provides that the department may enter into contracts for certain travel information production and services to attain more economical performance of those services than the department could achieve. The new section is substantively the same as the current provisions except that it substitutes "persons" for "commercial entities" to clarify that any legal entity may contract with the department under this section in accordance with Transportation Code, §204.008.

New §23.13, Travel Information, revises current §23.10(b). New subsection (a) revises current §23.10(b)(1) - (2) which limits subject matter for inclusion in travel information by referring to Transportation Code, §204.001, rather than listing the subjects. This revision allows the division more discretion within the statutory limits to select subject matter for travel information and the ability to be more dynamic in meeting the needs of the traveling public.

New subsection (b) substantively restates current §23.10(b)(3) with minor revisions and clarifies that the director, rather than the department, may consider the information for inclusion. It provides that the Travel Information Division Director or the director's designee (director) may consider materials submitted by a third party for inclusion in travel information.

New subsection (c) revises current §23.10(b)(4) and creates a less formal process for the director to remove information submitted by non-department personnel from travel information on receipt of a complaint of inaccurate information or inadequate services related to the information. This revision permits a more flexible process for the division and the interested parties to attempt to cure complaints, while still requiring written notice of the complaints and written notice of removal to the person who submitted the information to the division.

New §23.14, Texas Official Travel Map, is substantially the same as current §23.12 with grammatical and formatting changes to conform to the new rule organizational structure. It provides guidelines and requirements for what will be included in the official travel map of the state.

New §23.15, Acceptable Advertising Subject Matter, combines current §23.10(e)(2) and §23.29(b). The new section is substantially the same with grammatical and formatting changes to conform to the new rule organizational structure. It lists the subject matter that is acceptable in department travel information. The new rules include the *Texas Highways* magazine in the definition of travel information for purposes of acceptable advertising to reduce unnecessary repetition throughout this subchapter. The new section also adds language to clarify that advertising subject matter is subject to the limitations of Transportation Code, §204.001 to ensure the rules do not conflict with current law.

New §23.16, Unacceptable Advertising Subject Matter and Restrictions, combines, revises, and reformats current §23.10(e)(3) and (5)(A) - (B) and §23.29(c) and (e)(1) - (2). It provides for restrictions and subject matter limitations for advertising in department travel information. The new section is substantially the same as the current provisions, except that new subsection (c) allows the advertisement of all registered Texas Department of Agriculture's GO TEXAN products that are grown, produced, or manufactured in Texas, or the facility or facilities where the registered Texas Department of Agriculture's GO TEXAN products are grown, produced, or manufactured in Texas. The current rule excepts only Texas wineries, and the department considers it appropriate to broaden the exception to a broader range of advertisers and allow all GO TEXAN products and related facilities to advertise with the department if they desire.

New §23.17, Advertising Notices, revises and combines current §23.10(e)(4)(A) and (D)(ii) and (iv) and §23.29(d)(1) and (4)(B) and (D). It provides that an interested person can request to receive advertising information via electronic mail (e-mail) by registering through the department's website. The new section also states the department may provide information to those on the e-mail list at any time, and that at least annually the department will publish a notice in the *Texas Register* with instructions on how to be placed on the e-mail list. The section also provides a process for a person to receive the advertising information without having to be on the e-mail list. The new section also allows the department to streamline and modernize the dissemination of advertising information to interested persons by using e-mail and the department's website. It allows persons to register and receive advertising information year round, rather than the intermittent publication of information in the *Texas Register* and the physical mailing of advertising notices and rate cards. These changes will save the department administrative costs and allow easier access for persons interested in advertising in department travel information year round.

New §23.18, Advertising Rates and Sales, revises and combines current §23.10(e)(4)(B), (C), and (D)(i) and (iii) and §23.29(d)(2), (3), and (4)(A) and (C). It provides that the department will calculate rates for each travel publication that is deemed appropriate for advertising and will publish the information year round on the department's website. The new section also states that the department will accept orders for paid advertising that meet all the applicable requirements and are received before the publication deadline, in the order in which the orders are received, until all advertising space for the publication is filled. The new section allows the department to streamline and modernize the dissemination of advertising information to interested persons by using e-mail and the department's website. The new section allows persons to register and receive advertising information year round, rather than the intermittent publication of information in the *Texas Register* and the physical mailing of advertising notices and rate cards. These changes will save the department administrative costs and allow easier access for persons interested in advertising in department travel information year round.

New §23.19, Removal of Advertising, revises and combines current §23.10(e)(5)(C) and §23.29(e)(3). It provides that the department may remove an advertisement from travel information based on a third party complaint. The section requires written notice with the stated reasons for removal if the department acts to remove an advertisement. The new section removes some of the strict formalities and time frames of the complaint and removal process that are in the current rules. This language allows both the department and a third party advertiser greater flexibility to resolve complaints without the necessity of removal of an advertisement.

New §23.20, Distribution, is substantially the same as current §23.10(c) with grammatical and formatting changes to conform to the new rule organizational structure. It provides the various policies and procedures for distribution of travel information, either free of charge or for reimbursement of production cost to the department, as they apply to different individuals and entities. To comply with Transportation Code, §204.002, the section also provides that an individual who requests a single copy of a travel information publication will be provided one copy free of charge. The new section exempts the *Texas Highways* magazine from the section because the distribution of *Texas Highways* magazine, unlike other travel information, is subject to Transportation Code, §204.010, which requires the department to set subscription rates and other charges for the magazine at a level that generates receipts approximately sufficient to cover the cost of producing and distributing the magazine.

New §23.41, Purpose, contains the purpose and scope of new Subchapter C (relating to Travel Information Centers) and revises current §23.14(a) with the addition of language stating that the sale of commercial advertising space at travel information centers is now part of the operations of travel information centers. Senate Bill 1017, 83rd Legislature, Regular Session, 2013, amended Transportation Code, §204.003, allowing for the sale of advertising space at travel information centers to generate additional revenue for the department, if the department chooses to do so. The statutory amendment was the result of a change to federal law as enacted by MAP-21, which now allows limited commercial operations at facilities located at rest areas, including limited commercial advertising at travel information centers.

New §23.42, Display of Non-Department Produced Travel Information, revises current §23.14(c) - (f) and eliminates unnecessary language, but remains substantially the same in substance. It provides that the department may display travel information provided by non-department personnel at travel information centers. The new section states the subject matter limitations, the process for requesting the display of travel information, and the policies the department will use to display and dispose travel information provided by third parties. The new section clarifies that travel information submitted is subject to the limitations provided by Transportation Code, §204.001 rather than listing the subjects. This revision allows the division more discretion within the statutory limits to select travel information submitted to the department and permits the department to be more dynamic in meeting the needs of the traveling public. The new section subdivides the current section into smaller sections and reorganizes them so that the public may more clearly understand the process and policies for having third party travel information displayed at travel information centers.

New §23.43, Advertising at Travel Information Centers, provides that the department may sell commercial advertising space at travel information centers. Advertising at a travel information center may not exceed 60 percent of available display space in the facility and must be exhibited solely within the facility. This language is necessary to comply with 23 U.S.C. §111 and 23 C.F.R. §752.8. The new section also states what subject matter is acceptable for advertising at a travel information center and specifies subject matter that is unacceptable for advertising at a travel information center. This language is necessary to comply with Transportation Code §204.001. The new language concerning advertising subject matter in subsections (c) - (e) essentially mirrors the language of new §23.15 and §23.16. This standardizes all rules related to the sale of advertising for the division and allows the department to integrate operations of advertising sales to achieve savings and attempt to increase advertising revenue. The standardization also provides a consistent framework across all division advertising programs so that advertisers may more easily purchase advertising space from the department. The new section also recognizes that the department may contract with a vendor for the sale of advertisements at a travel information center as authorized under new §23.46 (relating to Vendor for Advertising Operations).

New §23.44, Agreement for Advertising at Travel Information Centers, provides that an advertiser must enter into an agreement of a term of not more than two years with the department or its agent before an advertisement may be placed at a travel information center. The agreements must include language concerning: (1) compliance with all applicable laws; (2) the amount of charges for the advertising space; and (3) locations of advertisements. These requirements are consistent with other similar department programs and the requirements allow the department to more effectively protect the department and monitor contracts. The section also requires a termination clause in an agreement to protect the department from actions that would cause the department to lose federal funds. This language is necessary to comply with Transportation Code, §204.003.

New §23.45, Removal of Advertisement at Travel Information Centers, provides that the director or the department's vendor may remove an advertisement from a travel information center based on a third party complaint, a department determination that an advertisement is misleading or contains a misrepresentation of fact, or that it discriminates against any state or federally protected class of persons. The section requires written notice with the stated reason for removal if the department acts to remove an advertisement. This language allows both the department and a third party advertiser greater flexibility to resolve complaints without the necessity of removal of the advertisement. The language contained in subsection (b) closely mirrors new §23.19 (relating to Removal of Advertising) to create consistency and integration of all policies of the division relating to advertising.

New §23.46, Vendor for Advertising Operations, states the department may contract with a vendor to administer the operations of advertising at travel information centers. This allowance is consistent with other similar department programs and is authorized under Transportation Code, §204.003. The section also provides that a vendor operating advertising operations at a travel information center must submit quarterly and annual reports to the department concerning: (1) a list of all participating advertisers that have agreements with the vendor for advertising at department travel information centers; (2) data of sales, rates and unused space; (3) revenues collected by the vendor and submitted to the department from the sales of advertising space at department travel information centers; and (4) any other information associated with the contract that the department determines necessary. These requirements are consistent with other similar department programs and allow the department to more effectively protect the department, monitor contracts, and make appropriate pricing decisions for advertising rates.

New §23.47, Advertising Sales and Solicitations, provides that an interested person can request to receive advertising information via e-mail by registering through the department's website. The new section also states the department may provide information to those on the e-mail list at any time, and that at least annually the department will publish a notice in the *Texas Register* with instructions on how to be placed on the e-mail list. The

section provides a process for a person to receive the advertising information without having to be on the e-mail list. The section closely mirrors new §23.17 (relating to Advertising Notices) to create consistency and integration of all policies of the division relating to advertising and advertising sales. This will also allow the department to streamline the dissemination of advertising information to interested persons by utilizing e-mail and the department's websites. It allows a person to register and receive advertising information year round, rather than the intermittent publication of information in the *Texas Register* and the physical mailing of advertising notices and rate cards by the department. This will save the department administrative costs and allow easier access year round for advertisers interested in advertising in department travel information centers.

New §23.48, Advertising Rates and Sales, provides that the department will calculate rates for each travel information center that is considered appropriate for advertising and will publish the information year round on the department's website. The published information will include advertising space and positions, advertising rates, and unique travel information center public visitor data. The new section states that the department will accept orders for paid advertising that meet all applicable requirements, in the order in which the orders are received, until all advertising space is filled and will create a waiting list if necessary. The language in the new section closely mirrors new §23.18 (relating to Advertising Rates and Sales) to create consistency and integration of all policies of the division relating to advertising and advertising sales. This will also allow the department to streamline the dissemination of advertising information to interested persons by using e-mail and the department's websites. It allows a person to register and receive advertising information year round, rather than the intermittent publication of information in the *Texas Register* and the physical mailing of advertising notices and rate cards by the department. This will save the department administrative costs and allow easier access year round for advertisers interested in advertising in department travel information centers.

New §23.49, Vending Machines, revises of current §23.14(g) and provides that the department may permit vending machines at a travel information center and that Texas Department of Assistive and Rehabilitative Services, Division for Blind Services, has first right of refusal to operate the vending machines. The new section is substantially the same as the current provision except that it removes language prohibiting charging for goods or services at a travel information center. Federal and state laws have been amended to allow for certain limited commercial activities at travel information centers, including the sale of certain items and advertising. This revision was necessary to accurately reflect changes in law to 23 U.S.C. §111 and Transportation Code, Chapter 204.

New §23.50, Non-department Use of Travel Information Centers, is essentially the same as the current §23.14(h) with grammatical and formatting changes to conform to the new rule organizational structure. It provides the process and requirements for a person to request use of a travel information center for non-department use, and the policies and rules that apply to that use.

New §23.61, Purpose, combines current §23.51 and §23.101 and contains the purpose and scope of new Subchapter D (relating to Promotional Product Program) as authorized by Transportation Code, §204.009. The program allows the department to sell promotional items approved by the commission that advertise the resources of the state to generate revenue for use in the department's travel and information operations. The new subchapter combines the current Promotional Product Program and Merchandise Program. After an unsuccessful request for proposal by the department in 2013 to secure vendors for the programs, the department has reassessed the current rules and has attempted to clarify and more precisely present the program as a single operation that includes all components of the two current programs. The department believes that the combining of the two programs will allow outside vendors, wholesalers, and retailers a more clear understanding of the rules and create broader participation, leading to revenue generation for the department.

New §23.62, Definitions, incorporates and combines the definitions from the current §23.52 and §23.102 and contains substantially identical definitions except "program" refers to the Promotional Product Program reflecting the combination of the current Merchandising Program and the Promotional Product Program.

New §23.63, Sale of Products by the Department, is substantially the same language as the current §23.53 and provides the locations where the sale of products under the program may occur and various sales and payment requirements. The new section adds language that allows the department to sell products under the program through department controlled or operated websites that promote department programs or campaigns. The current rule allows web based sales only through the *Texas Highways* magazine website. The department has various other websites, such as the Don't Mess with Texas website, that promote department programs and campaigns that the department believes can more strategically target customers for certain products under the program. These additional points of sale will allow the department more flexibility in the operation of the program.

New §23.64, Refunds and Complaints, revises current §23.59 with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides the process for a person to receive a refund for undamaged returned products and provides for a complaint process concerning products under the program.

New §23.65, Types of Promotional Products, is essentially the same language as the current §23.54 with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides a requirement that products sold under the program must advertise resources of the state as required by Transportation Code, §204.009. The new section also provides the different product categories.

New §23.66, Request for Inclusion of Product in Program, revises current §23.55 with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides the process and requirements for a wholesaler to request to have a product included in the program and provides that the director will make the final determination of those requests.

New §23.67, Market Research and Product Selection, is substantially the same as the current §23.56 with minor grammatical and formatting changes to conform to the new rule organizational structure. It states that the department may conduct market research for the program to assist with product selection and may obtain bids from a wholesaler to produce products under the program. The new section also provides that the department will keep a list of wholesalers who express interest in providing products for the program and that the department will notify them of those opportunities as they arise.

New §23.68, Vendor Contract and Duties, revises and combines current §23.57(a) - (c) and part of (d) and §23.105(a). It provides the department may contract with a vendor to provide any of the following services for the program: (1) conducting market research; (2) soliciting products; (3) conducting initial product selection; and (4) managing product acquisitions, inventory, or sales. The new section states that a vendor must keep all records received from wholesalers regarding project selection and that a vendor who manages product acquisitions or product sales for the program must enter into the appropriate agreements required by the rules with wholesalers and retailers. The specific requirements of paragraphs (1) - (4) of current §23.57(d) are incorporated into new §23.69 (relating to Vendor Wholesale Report) so that the rules read more coherently and the specific requirements are more easily located.

New §23.69, Vendor Wholesale Report, is essentially the same as the current §23.57(d) with grammatical and formatting changes to conform to the new rule organizational structure. It provides that a vendor that contracts to manage product acquisitions for the department shall furnish to the department certain monthly and annual reports relating to wholesale information. The reports must include information relating to wholesalers participating in the program through the vendor, wholesalers who submitted products to the vendor for consideration, descriptions of products submitted and whether the product was selected or rejected, revenues submitted by the vendor to the department, and the amount of fees retained by the vendor.

New §23.70, Vendor Retail Report, is largely the same as the current §23.105(c) with grammatical and formatting changes to conform to the new rule organizational structure. It provides that a vendor that contracts to manage product sales for the department shall furnish to the department certain monthly and annual reports relating to retail information. Those reports must include information relating to names and contact information of retailers participating in the program through the vendor, administrative and royalty fees owed to the vendor under the program and those collected by the vendor, revenue submitted to the department, and other contract details between the vendor and retailer.

New §23.71, Wholesaler Agreement, is substantially the same as the current §23.58 with grammatical and formatting changes to conform to the new rule organizational structure. It provides that a wholesaler whose product is selected must enter into an agreement with the department or the department's vendor that addresses types of products, pricing, distribution, termination of the contract and other contract as determined by the department before the product may be sold under the program.

New §23.72, Retailer Agreement, is substantially the same language as the current §23.105(a) - (b) with grammatical and formatting changes to conform to the new rule organizational structure. It provides that a retailer that sells products through the program must enter into an agreement of not less than two years with the department or its vendor before any product may be sold. The agreement must include terms concerning details about the products being sold, fees, pricing, and must require compliance with all state laws prohibiting discrimination based on any state or federally legally protected class of persons.

New §23.73, Use of Department Owned Intellectual Property, combines current §23.58(a)(8) and §23.103(c) and is essentially the same. The new section clarifies that any third party involved in the program that uses department owned trademarks must enter into an appropriate license agreement under Transportation Code, §201.205, as part of its contract.

New §23.81, Purpose, provides the purpose and scope of new Subchapter E (relating to Subscriber and Purchaser Information). Transportation Code, §204.011 requires the commission to adopt policies related to subscriber and purchaser information.

New §23.82, Definitions, incorporates the definition of "subscriber" from the current §23.2 without change and incorporates and modifies the definition of "purchaser" to include persons who purchase promotional products generally as defined, as opposed to only a purchaser of a *Texas Highways* magazine product. This clarification is necessary to reflect previously adopted changes in the rules expanding the promotional products program. This change also makes the terms easier to locate and language easier to understand because the terms are only used in that subchapter.

New §23.83, Department Use, is the same as current §23.28(a) with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides that the department may use purchaser and subscriber information for purposes of marketing, surveying customers, and offsetting statewide travel operations costs.

New §23.84, Mailing List, is substantially the same as current §23.28(b)(1) and (3) with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides that the department may sell a mailing list containing purchaser and subscriber information and also provides a process for a purchaser or subscriber to have their information removed from a mailing list sold by the department.

New §23.85, Governmental Agency, is the same as current §23.28(c) with minor grammatical and formatting changes to conform to the new rule organizational structure. It provides that subscriber and purchaser information may be disclosed to certain governmental entities on a limited basis.

COMMENTS

No comments on the repeals and new sections were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §23.1, §23.2

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Joanne Wright
Deputy General Counsel
Texas Department of Transportation
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SUBCHAPTER B. TRAVEL INFORMATION

43 TAC §§23.10, 23.12 - 23.14

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

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Deputy General Counsel
Texas Department of Transportation
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SUBCHAPTER C. TEXAS HIGHWAYS MAGAZINE

43 TAC §23.28, §23.29

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

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Texas Department of Transportation
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SUBCHAPTER D. PROMOTIONAL PRODUCT PROGRAM

43 TAC §§23.51 - 23.59

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Joanne Wright
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SUBCHAPTER E. MERCHANDISING PROGRAM

43 TAC §§23.101 - 23.105

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002,

which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §23.1, §23.2

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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SUBCHAPTER B. TRAVEL INFORMATION

43 TAC §§23.11 - 23.20

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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SUBCHAPTER C. TRAVEL INFORMATION CENTERS

43 TAC §§23.41 - 23.50

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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SUBCHAPTER D. PROMOTIONAL PRODUCT PROGRAM

43 TAC §§23.61 - 23.73

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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SUBCHAPTER E. SUBSCRIBER AND PURCHASER INFORMATION

43 TAC §§23.81 - 23.85

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §204.002, which provides the Commission with the authority to establish rules to require payment for large quantities of travel material, and §204.011, which provides the Commission with the authority to adopt rules to establish policies relating to the release, use, and sale of information related to subscribers of *Texas Highways* magazine or purchasers of promotional items.

CROSS REFERENCE TO STATUTE

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CHAPTER 25. TRAFFIC OPERATIONS

SUBCHAPTER G. INFORMATION LOGO SIGN AND TOURIST-ORIENTED DIRECTIONAL SIGN PROGRAM

43 TAC §§25.401, 25.404, 25.405, 25.407, 25.408

The Texas Department of Transportation (department) adopts amendments to §25.401, Definitions, §25.404, Specifications for Information Logo Signs, §25.405, Commercial Establishment Eligibility, §25.407, Logo Sign Program Operation, and §25.408, TOD Sign Program Operation, all concerning the Information Logo Sign and Tourist-Oriented Directional Sign Program. The amendments to §25.401, §25.404, §25.405, §25.407, and §25.408 are adopted without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7892) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Under Transportation Code, Chapter 391 the department is responsible for managing several sign programs designed to provide motorists with information. The programs are Specific Information Logo Signs (Logo), Major Shopping Area Guide Signs (MSAG), and Tourist-Oriented Directional Signs (TOD).

These amendments to the Logo and TOD sign program update and streamline the administrative processes and make changes necessary to comply with the current Texas Manual on Uniform Traffic Control Devices (TMUTCD).

Amendments to §25.401, Definitions, delete the definition of the term "dual logo" as it is no longer permitted under the 2011 TMUTCD.

Amendments to §25.404, Specifications for Information Logo Signs, make various changes to address revisions to the TMUTCD.

Amendments to §25.404(a)(2)(B) correct the requirement that a Logo sign without an exit number contain the term "NEXT RIGHT" instead of "NEXT EXIT" to be consistent with the 2011 TMUTCD.

Section 25.404(a)(2)(E) and (d) are amended to delete the references to dual logos which are no longer permitted under the 2011 TMUTCD.

Section 25.404(b)(2)(B) is amended to allow the display of supplemental messages on business logos for the availability of the alternative fuels compressed natural gas (CNG) and liquefied natural gas (LNG) as permitted under the 2011 TMUTCD.

Section 25.404(b)(2)(E) is also amended to allow the display of an "RV Access" supplemental message on business logos as permitted under the 2011 TMUTCD.

Section 25.404 is also amended by adding subsection (f) to provide that the department reserves the right of final approval of the content and placement of all signs and business logos. The department has been involved in the review of logos placed in the highway right of way and this change to the rule clarifies that position.

Amendments to §25.405, Commercial Establishment Eligibility, delete the reference to dual logos in §25.405(d)(3) which are no longer permitted under the 2011 TMUTCD.

Amendments to §25.407, Logo Sign Program Operation, delete the requirement in §25.407(b)(5) that required commercial establishments be notified by "certified mail" when determining which businesses will be displayed on a logo sign when there is more demand than spaces available as there are more efficient communications methods available and certified mail is no longer necessary.

Amendments to §25.408, TOD Sign Program Operation, delete the terms "nurseries" and "greenhouses" from the list of examples of eligible businesses in §25.408(a)(2)(B)(ii) as these are not typical tourist destinations as defined by this program.

Section 25.408(a)(2)(C)(i)(II) is amended to add the phrase "offer services of interest to tourists upon walk-up request such as retail sales, tours, overnight accommodations, or use of on-site services or facilities" to clarify that TOD signs are intended for business participants that rely predominately on tourists as their customers.

Section 25.408(h) is amended to clarify that wineries that had signs through a state signing program prior to the existence of the TODS program are eligible for participation in the program. This amendment was needed to clarify that not all wineries with signs qualify but only those with signs prior to the implementation of the TOD program.

Section 25.408(j)(4)(D) is also amended to delete the requirement that commercial establishments be notified by "certified mail" when determining which businesses will be displayed on a TOD sign when there is more demand than spaces available as there are more efficient communication methods available and certified mail is no longer necessary.

COMMENTS

The department received comments from Texas Railroad Commissioner David Porter; Christopher Coleman of America's Natural Gas Alliance; Mr. Steven Altus of Anadarko Petroleum Corporation in Houston; and Mr. James G. King supporting the amendment to include the display of supplemental messages on business logos for the availability of the alternative fuels compressed natural gas (CNG) and liquefied natural gas (LNG).

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.092, §391.093, and §391.0935, which provide the commission with the authority to establish rules regarding the Specific Information Logo Sign Program, and Transportation Code, §391.099, which authorizes the commission to adopt rules to administer and enforce the Tourist-Oriented Directional Sign Program.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 391, Subchapter D.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

SUBCHAPTER H. HIDALGO COUNTY REGIONAL MOBILITY AUTHORITY PERMITS

43 TAC §28.100, §28.102

The Texas Department of Transportation (department) adopts amendments to §28.100 and §28.102, concerning Hidalgo County Regional Mobility Authority Permits. The amendments to §28.100 and §28.102 are adopted without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7902) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

These amendments grant the Hidalgo County Regional Mobility Authority (HCRMA) additional authority to issue permits for the operation of oversize/overweight vehicles on the designated highways within the county. House Bill 474 of the 83rd Legislative Session, 2013, authorized the commission to designate additional routes for which HCRMA could issue oversize and overweight permits. The department worked with HCRMA to identify additional routes that would benefit the HCRMA permitting process and the motor carrier operators.

Amendments to §28.100 add language to state that the purpose of the rule is to authorize the issuance of permits by the HCRMA to roads listed under Transportation Code §623.322, as added by Chapter 1135 (H.B. 474), Acts of the 83rd Legislature, Regular Session, 2013, and roads designated by the commission. This language identifies the statutory change and the commission's expanded powers to designate additional routes.

The language in §28.102 is amended to list the additional routes designated by the commission for which HCRMA is authorized to issue permits for the operation of oversize/overweight vehicles. The listed roads to be added include: US 281/Military Highway from Spur 29 to FM 1015; FM 1015 from US 281/Military High-

way, south to the Progresso International Bridge; FM 2557 from US 281/Military Highway to Interstate 2; FM 3072 from Veteran Boulevard ("I" Road) to Cesar Chavez Road and US 281 (Cage Boulevard) from Spur 600 to Anaya. These sections of roadways will expand Hidalgo County Regional Mobility Authority's permitting authority. This provides the HCRMA greater authority in the operation of the roadways within their jurisdiction and allows them to provide a more complete service to the motor carriers within the county.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.328, which allows the commission to authorize the authority to issue permits for the movement of oversize or overweight vehicles.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623, Subchapter Q, as added by Chapter 1135 (H.B. 474), Acts of the 83rd Legislature, Regular Session, 2013.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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